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Supreme Court, U.S.
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No. 00-

IN THE

Supreme Court of the United States

MOHAMMAD M. SHINWARI,

Petitioner,

v.

RAYTHEON AIRCRAFT COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the opinion of the Tenth Circuit Court of Appeals in this case conflicts with the decision of the United States Supreme Court in ***Reeves v. Sanderson Plumbing***, __ U.S. __, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000), in that the Tenth Circuit: (a) agreed with Petitioner that a ***prima facie*** case of discrimination was shown, but (b) did not agree that Petitioner presented ". . . sufficient evidence for the trier of fact to disbelieve . . ." Respondent's explanation for its decision to terminate petitioner, in spite of the uncontroverted evidence, in addition to the ***prima facie*** case, that Respondent altered critical deposition testimony to mask its actual, illegal motive.

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Petitioner respectfully petitions for a writ of certiorari to review the judgment of the Tenth Circuit Court of Appeals in this case.

OPINIONS BELOW

The United States District Court for the District of Kansas issued its Order Granting Summary Judgment on July 23, 1998. That opinion may be found at 16 F. Supp. 2d 1308. (App. 44a) The District Court denied Petitioner's Motion to Reconsider on October 15, 1998; that opinion may be found at 25 F. Supp. 2d 1206. (App. 27a) The Tenth Circuit Court of Appeals affirmed the District Court in an unpublished opinion, dated June 8, 2000, cited as 215 F.3d 1337. (App. 1a) The Tenth Circuit denied rehearing and reconsideration en banc in another unpublished opinion, dated July 11, 2000. (App. 94a)

STATEMENT OF JURISDICTION

The judgment sought to be reviewed was entered by the Tenth Circuit Court of Appeals on June 8, 2000. The Tenth Circuit Court of Appeals denied Petitioner's Petition for Rehearing and for En Banc Consideration on July 11, 2000. Jurisdiction in this Court is based upon 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Seventh Amendment provides:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.

Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-2, provides in pertinent part:

> It shall be an unlawful employment practice for an employer —
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-3(a), provides in pertinent part:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

The Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 632(a), provides in pertinent part:

> It shall be unlawful for an employer —
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

The Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 632(d), provides in pertinent part:

> It shall be unlawful for an employer to discriminate against any of his employees . . . because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.

Rule 56 of the Federal Rules of Civil Procedure provides in pertinent part:

> (c) *Motion and Proceedings thereon.* [T]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law . . . .

STATEMENT OF THE CASE

Petitioner Mohammad Shinwari commenced this action in the United States District Court for the District of Kansas, raising claims of discrimination based on national origin and age discrimination, and retaliation for having complained of discrimination. The District Court had jurisdiction pursuant to 28 U.S.C. § 1331. Following discovery, Petitioner dismissed his claims of discrimination, but maintained his claims of retaliation. The United States District Court for the District of Kansas granted Respondent's motion for summary judgment on July 23, 1998, and denied Petitioner's Motion to Reconsider on October 15, 1998. The Tenth Circuit Court of Appeals affirmed the District Court in an unpublished opinion, dated June 8, 2000, and denied rehearing and reconsideration en banc in another unpublished opinion, dated July 11, 2000. Four days later, the United States Supreme Court handed down its decision in ***Reeves v. Sanderson Plumbing Products, Inc.***, __ U.S. __, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000).

SUMMARY OF FACTS

Petitioner Mohammad M. Shinwari (hereinafter "petitioner") was born on May 10, 1947. He began working for the Raytheon Aircraft Company (hereinafter "Respondent") on March 9, 1994. Petitioner's belief that he was the victim of age discrimination was based on several factors. First, petitioner's new supervisor was surprised at petitioner's low salary, given his background and experience. Further, that supervisor told petitioner that petitioner was not given many opportunities to make presentations because he was "giving an opportunity to the young leads." Petitioner also believed that other employees over 40 had been demoted, and had leadership responsibilities reduced. Further, another, younger employee was promoted to a lead position above petitioner.

In September '96 petitioner contacted Respondent's Director of Personnel Relations in Employment to complain about a negative evaluation. In a brief meeting with the Director, while he did not mention the words "age discrimination" or "national origin discrimination" (petitioner is Pakistani), petitioner told the Director that he felt the ratings he received were biased and that there was "*quite a bit of discrimination.*" Petitioner had another meeting with the Director and his supervisor on November 15, and complained of bias and discrimination. In a second meeting that same day, he received a Memorandum and Special Performance Review, which for the first time raised issues of technical competence and rated him unsatisfactory.

Two weeks after that meeting, petitioner sent a memo to the HR director, stating that he believed management was attempting to eliminate older workers from lead positions and to weed out older workers at Raytheon. At the November 15 meeting, petitioner specifically stated that the discrimination he felt was because of his age and his national origin. Petitioner concluded that he was the victim of discrimination, because he could not see any other basis for the unfair treatment and evaluations he was receiving. In the short time between his September 1996 evaluation and his November 1996 evaluation, his performance rating dropped two levels, from "fully competent" to "unsatisfactory."

Following the November 15 meeting, and petitioner's complaint of discrimination, petitioner's work environment became uncomfortable and strained. As a result of that environment, petitioner complained by memorandum on January 12, 1997, which he followed up with an e-mail on January 13, containing essentially the same information. In that e-mail, petitioner specifically complained about age discrimination and national origin discrimination. Respondent's HR Director admits to receiving both documents, but claimed that she did not provide any of petitioner's supervisors with the January 13 e-mail or memo until *after* petitioner's termination. That is directly contrary to the testimony of Sam Bruner, one of the decision makers:

Q. Did you know that Mr. Shinwari had complained in January prior to his termination that he was being discriminated against?

A. Yes, I was aware of that.

Q. When did you become aware of that?

A. Probably shortly after the letter arrived.

Q. What letter are you talking about?

A. *Wasn't there a letter that we got in some time frame stating that he was being discriminated against on the basis of his age and I think it was national origin*?

MS. MANN: Talking about the EEOC Complaint?

A. Maybe I am getting confused, but I thought we received a letter in the January time frame that we all read and commented on that it looked like he had received some coaching from somebody in the content of that letter.

Q. Let's see, I don't know if we have marked this or not.

A. There are so many documents, they are all starting to run together. At some point in time we received a document from Mohammad stating that he had been — he felt he had been discriminated against.

> (Deposition Exhibit 60 [A.2, Tab 15] marked for identification by the reporter).
>
> Q. Is that the document that you are referring to, Exhibit 60?
>
> A. Let me read it before I answer. *Yes, this is the one I am talking about.*
>
> Q. You say that you talked with someone else about it and wondered whether or not Mr. Shinwari had received some coaching in the preparation of this document. Who is it you talked with?
>
> A. Oh, I can't remember. *Probably Art [Kavie] and Rick Gaines and Eddy [Arnold], all the people who are involved in this.*
>
> Q. *Do you recall when that conversation took place?*
>
> A. *Well, it probably would have been the day this came out, because this is the sort of thing that would generate some response among the recipients.*

Bruner (and others) not only received the memo, but *discussed it with* others involved in the decision. Later, Bruner used the errata sheet attached to his deposition to change his testimony to say that he had ***not*** received the memo. (App. 23a) Four days later, on January 17, the decision was made to terminate petitioner. Bruner and Kavie made the decision to terminate petitioner, at least seven (7) days prior to Bruner drafting the termination notice dated January 24. The termination notice characterized petitioner as a "problem employee." On January 24, he was given his termination notice.

REASONS FOR GRANTING THE WRIT

THE DECISION OF THE TENTH CIRCUIT COURT OF APPEALS CONFLICTS WITH DECISIONS OF THE UNITED STATES SUPREME COURT.

The recent Supreme Court decision in ***Reeves v. Sanderson Plumbing Products, Inc.***, __ U.S. __, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000) mandates a reversal of the Panel's decision. On June 12, 2000, four days after the Panel handed down its decision in this case, the United States Supreme Court decided ***Reeves***. The ***Reeves*** opinion clarifies standards for the granting of a summary judgment.[1] As it relates to this case, the Supreme Court resolved the issue of ". . . whether a defendant is entitled to judgment as a matter of law when the petitioner's case consists exclusively of a prima facie case of discrimination and sufficient evidence for the trier of fact to disbelieve the defendant's legitimate, nondiscriminatory explanation for its own action." ***Reeves***, 120 S. Ct. at 2103. Here, the Panel held that a prima facie case existed; *the only remaining issue* is whether there is "sufficient evidence for the trier of fact to disbelieve" Raytheon's explanation.

---

[1] While the ***Reeves*** case involved the reversal of a judgment as a matter of law, ". . . the standard for granting summary judgment 'mirrors' the standard for judgment as a matter of law, such that 'the inquiry under each is the same.' " ***Reeves***, at 2110, citing ***Anderson v. Liberty Lobby, Inc.***, 477 U.S. 242, 250-51 (1986).

The first step in proving a case of discrimination is the establishment by petitioner of a prima facie case. ***Id.***, at 2106. On this point, the Supreme Court and the Panel here agree. Further, the Panel concluded that petitioner has met his burden of establishing a prima facie case of retaliation. (App. 18a). The Panel and the Supreme Court in ***Reeves*** agree that the burden then shifts to the defendant to establish a legitimate reason for the termination. At that point, the petitioner "must be afforded the 'opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.' " ***Reeves***, at 2106, citing ***St. Mary's Honor Center v. Hicks***, 509 U.S. 502, 507-08 (1993):

> That is, the plaintiff may attempt to establish that he was the victim of intentional discrimination "by showing that the employer's proffered explanation is unworthy of credence." (citation omitted). Moreover, although the presumption of discrimination drops out of the picture once the defendant meets its burden of production, *St. Mary's Honor Center*, ***supra***, at 511, the trier of fact *may still consider the evidence establishing the plaintiff's prima facie case and inferences properly drawn therefrom . . . on the issue of whether the defendant's explanation is pretextual.*

(citations omitted). ***Id.*** (emphasis added). Thus, it is clear that plaintiff may continue to rely upon the prima facie case to prove pretext. The ***Reeves*** Court found that the Fifth Circuit had ignored the evidence supporting the petitioner's prima facie case. ***Id.***, at 2107.

> That is, the Court of Appeals proceeded from the assumption that a prima facie case of discrimination, combined with sufficient evidence for the trier of fact to disbelieve the defendant's legitimate, nondiscriminatiory reason for its decision, is insufficient as a matter of law to sustain a jury's finding of intentional discrimination.

Id. The Supreme Court held that this approach "*. . . misconceived the evidentiary burden borne by plaintiffs who attempt to prove intentional discrimination through indirect evidence.*" ***Id.*** (emphasis added).

The Panel in this case, relying on ***Connor by Schnuck Markets, Inc.***, 121 F.3d 1390 (10th Cir. 1997) and ***Trujillo-Cummings v. Public Serv. Co.***, No. 97-2337 (1999) WL 169336, at **3 (10th Cir., March 29, 1999), took the approach adopted by the Fifth Circuit in ***Reeves***, rejected by the Supreme Court. ***Reeves*** clearly holds that the evidence that creates the prima facie case *remains*, and *may be considered* as evidence of pretext.

The remaining issue is whether petitioner has sufficient evidence that allows the fact finder to disbelieve Respondent's evidence. Here, Shinwari presented evidence that Raytheon ***tried to change testimony*** concerning a material fact. The ***Reeves*** opinion resolves the Panel's apparent struggle with the significance of this point:

> *. . . The trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general*

> *principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as "affirmative evidence of guilt."*

Reeves, at 2108 (emphasis added). Here, Respondent's decision-maker witness "corrected" his testimony about whether he had knowledge of the complaint of discrimination made by Shinwari, first testifying that he had knowledge, then, *after the deposition*, "correcting" his testimony to *deny* knowledge — a material and critical element in Shinwari's case. Knowledge of the decision-maker of a prior complaint is unquestionably a material fact; Raytheon's *dishonesty* about that material fact may be considered as *affirmative evidence of guilt*. Justice Ginsburg, in her Concurring Opinion, put it this way:

> Under this common sense principle, evidence suggesting that a defendant accused of illegal discrimination has chosen to give a false explanation for its actions *gives rise to a rational inference that the defendant could be masking its actual, illegal motive.*

Reeves, at 2112 (emphasis added).

While the Panel found that the changing testimony was a concern, it considered the event a "single, isolated inconsistency." (App. 24a). The Fifth Circuit took a similar (and rejected) approach in ***Reeves***, saying that evidence of pretext, "standing alone," was insufficient. ***Reeves***, at 2108. ***Reeves*** instructs that the "single, isolated inconsistency" must be *combined with* the prima facie case evidence; Shinwari's *additional* evidence concerning the unusual drop in his performance evaluation must also be considered. Finally, Raytheon's "interested witness" testimony must be disregarded. ***Reeves***, at 2110.

Eliminating the prima facie case from its consideration, the Panel then balanced the evidence of the parties. Relying on the "extensive and unrefuted record evidence" offered by Raytheon (App. 22a), the Court rejected Shinwari's evidence concerning the sudden drop in his job evaluations and the credibility issue created by the retraction of deposition testimony. Raytheon's evidence "may be received at trial; a jury may give it great weight. But in summary judgment proceedings, neither the district court nor [the appellate court] may place the parties' competing evidence in a balance scale when deciding whether to grant summary judgment." ***Bell v. Conopco, Inc.***, 186 F.3d 1099, 1102 (8th Cir. 1999). The ***Reeves*** opinion underscores the court's duty at summary judgment — the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence. ***Reeves***, at 2110. Furthermore, the court

> . . . must *disregard* all evidence favorable to the nonmoving party that the jury is not required to believe. (citation omitted). That is, the court should give credence to the evidence favoring the nonmovant as well as that evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that the evidence *comes from disinterested witnesses*.

Id. (emphasis added). Thus, evidence from *Raytheon's own officials* must be *disregarded*, as they are *not disinterested witnesses*. The Panel improperly balanced Shinwari's evidence of the precipitous drop in his job evaluations, which occurred at a *special* performance evaluation, and his evidence of changing testimony, against Raytheon's "interested witness testimony." As in ***Reeves***, ". . . the Court of Appeals erred in proceeding from the premise that a plaintiff must always introduce additional, independent evidence of discrimination." ***Reeves***, at 2109. The Panel here ultimately placed Raytheon's evidence on one side of the scale, Shinwari's in the other, and concluded that, even though Shinwari: (1) made a prima facie case, (2) presented evidence of a special performance evaluation drastically different than the one three months earlier, and (3) Raytheon's witness changed his testimony, those facts did not tip the scale enough. Indeed, the Panel reduced the changed testimony, which ***Reeves*** says may be used as affirmative evidence of guilt, down to a "single, isolated inconsistency." ***Reeves*** instructs that Raytheon's interested testimony should have been disregarded altogether.

CONCLUSION

In light of the Supreme Court's recent opinion in ***Reeves v. Sanderson Plumbing Products, Inc.***, the Panel's decision in this case should be reconsidered and reversed.

Respectfully submitted,

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APPENDIX

APPENDIX A — ORDER AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DATED AND FILED JUNE 8, 2000

UNITED STATES COURT OF APPEALS TENTH CIRCUIT

No. 98-3324
(D.C. No. 97-CV-2617)

MOHAMMAD M. SHINWARI,

Plaintiff – Appellant,

v.

RAYTHEON AIRCRAFT COMPANY,

Defendant – Appellee.

ORDER AND JUDGMENT*

Before **BRORBY**, **PORFILIO** and **LUCERO**, Circuit Judges.

This employment case involves the termination of an aircraft engineer, allegedly in retaliation for activity protected by Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-3(a), and the Age Discrimination in Employment Act ("ADEA"),

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. This court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

29 U.S.C. § 623(d). Appellant Mohammad Munir Shinwari appeals the district court's grant of summary judgment in favor of his former employer, defendant Raytheon Aircraft Company. This case requires us to examine the activities protected by the participation and opposition clauses of the anti-retaliation provisions of those statutes. Additionally, it requires us to consider, as in so many employment discrimination cases, the sufficiency of plaintiff's evidence of pretext in the employer's non-discriminatory reason for taking adverse action. We exercise jurisdiction pursuant to 28 U.S.C. § 1291, and affirm.

I

Plaintiff Shinwari is a "caucasian" male of Pakistani national origin. He was approximately fifty years old at the time of the relevant events. He was hired as a Senior Engineer by defendant Raytheon in early 1994, at a somewhat lower salary than the mid-point for engineers of his job grade. After first coming to Raytheon, Shinwari worked with Richard Gaines, who was involved in the decision to hire him, for between six months and one year. Shinwari received three annual performance review ratings — 1994 (from Gaines), 1995, and 1996 — of overall "fully competent." (II Appellant's App. Tabs 3, 5, 7; III Appellant's App., Gaines Dep. at 14-15.)

In late 1995, Shinwari was transferred to a new aircraft program, the "Hawker Horizon" program, based on his qualifications and a recommendation from Gaines. (III Appellant's App., Arnold Dep. at 1-3, 21-23.) The Hawker Horizon group was directed by Sam Bruner, and

Shinwari reported to Bruner's subordinate, Eddy Arnold, from November 1995 through mid-1996. In June 1996, Gaines was transferred into the Hawker Horizon program and some time thereafter again became Shinwari's supervisor.

Raytheon presented evidence of several alleged objective errors in Shinwari's work. Gaines described one incident wherein Shinwari selected a non-standard part for an admittedly minor detail in a proposed engineering drawing, and then refused to change the proposal after Gaines instructed him to use a more common part. Another incident involved alleged calculation errors by Shinwari, during early 1996, regarding an ice protection system. Derek Rounds, an engineer who had come from England along with the Hawker aircraft program, found errors, including inaccurate assumptions, in Shinwari's calculations; Gaines's evaluation confirmed the inaccuracies. According to Gaines, Shinwari denied making errors. Shinwari in his deposition continued to maintain there were no errors in the calculations and claimed that another employee, Ted Seely, agreed that there were no problems. The record contains no affidavit or deposition testimony by Seely.

Arnold, Shinwari's supervisor in the Hawker program, gave him an overall "fully competent" rating in his September 1996 annual performance review, noting, however, that Shinwari had difficulty accepting criticism and needed to exercise greater care in reducing errors. Arnold stated that he added the comment regarding error reduction at the behest of Bruner.

Shinwari was dissatisfied with this review and complained, in late September 1996, to Nita Long, Raytheon's Director of Personnel Relations in Employment, alleging the review was inaccurate and discriminatory, but not alleging specific instances of discrimination. Long was in charge of Equal Employment Opportunity ("EEO") programs for Raytheon.

Around this time, Gaines and Shinwari began having increased difficulty with one another, with Gaines complaining to Arnold of Shinwari's "arrogant incompetence," (III Appellant's App., Arnold Dep. at 54-55,) and Shinwari protesting the appointment of Gaines as lead supervisor of their engineering team without his (Shinwari's) prior notification.

The situation apparently worsened in October of 1996, after Gaines become Shinwari's immediate supervisor. Raytheon employees describe at least two incidents of errors or inappropriate conduct by Shinwari during this period. In one, Shinwari sent a memorandum to senior managers describing how one aircraft system should be configured, without sending it to his immediate supervisors, Gaines and Art Kavie. According to Kavie, this led the managers to conclude, erroneously, that the memorandum contained the views of his entire group, rather than Shinwari's proposals, which were directly contrary to Gaines's instructions to him.

Another October 1996 incident involved a proposed specification to be sent to suppliers regarding a pressurization control system. According to Gaines, Shinwari's work on this project was patently deficient, yet Shinwari refused to revise it at his request. Shinwari denies that his work product was in any way incorrect.

Following the September 1996 performance review and these incidents, Long and Shinwari met on October 23, 1996. Shinwari stated in his deposition that "I told Nita Long that the performance review that I have gotten are biased, and I see quite a bit of discrimination." (III Appellant's App., Shinwari Dep. at 468.) He does not indicate whether he alleged the basis — age, national origin, or otherwise — of this perceived discrimination. Long denies that Shinwari made any allegation of age or national origin discrimination at their meeting.

At the request of both Shinwari and his supervisors, Long set up meetings between them to attempt to resolve the conflict. Shinwari states that on November 15, 1996, at one such meeting with Long, Arnold, and Bruner, he complained, verbally, of "bias and discrimination," in protesting his performance evaluation. (III Appellant's App., Shinwari Dep. at 611.)[1] At the second of the two meetings later that same day, Shinwari's supervisors issued him a "special" performance review rating him unsatisfactory in almost all categories. Shinwari refused to sign the review and responded that the review was unjustified and based on discrimination as well as in retaliation for his opposition to the September review and alleged earlier complaints of discrimination. After the meeting, conflict between Shinwari and Gaines continued.

---

[1] Shinwari, in his deposition, did not specify the type of discrimination to which he referred.

At a November 27, 1996, meeting, Shinwari responded in writing to his special performance review, disagreeing with all the particulars. He also attached a note to Long's copy of this memorandum, stating that "I believe that the Special Review was done in retaliation for my having met with you and raised complaints," and specifying that he had begun to believe the review was motivated by age and national origin discrimination, although he "[did] not have any proof." (II Appellant's App. at 15.) According to Long, she did not show this attachment to anyone, nor investigate further Shinwari's allegations, because it was clear to her he was simply "looking for a way around the fact that his performance was unsatisfactory." (III Appellant's App., Long Dep. at 344.)

Problems in Shinwari's work continued, including, according to Gaines, handwritten and poor-quality work, and failure to take direction. In December 1996, Shinwari received a comparatively small merit pay increase; on January 13, 1997, he e-mailed Long with further complaints, stating that "I strongly believe that I am, on a regular basis, discriminated against, because of my age and other background." (II Appellant's App. at 23.)

In mid-January, after Shinwari's supervisors informed Long that problems with Shinwari continued and they wanted him transferred, no other supervisors were willing to accept him. On or around January 17, Art Kavie, director of the Hawker design group, decided to terminate Shinwari, with the approval of Bruner. Raytheon offered him the choice of resignation or involuntary termination. Shinwari chose the latter, complained to the EEOC, and eventually sued, alleging age and national origin discrimination and retaliation. Prior to summary judgment, he dropped the discrimination claims, leaving only his retaliation claims for resolution by the court.

The district court granted summary judgment in favor of Raytheon on both of Shinwari's retaliation claims. As for the ADEA retaliation claims, it found no prima facie case of retaliation because Shinwari lacked a reasonable belief age discrimination had occurred, and that even if he made a prima facie case, he failed to rebut Raytheon's neutral reasons for termination. On the Title VII retaliation claims, the court found an absence of pretext evidence and granted summary judgment to Raytheon on that ground.

II

Considering this appeal from an award of summary judgment, we employ our customary standard of review:

> We review a grant of a motion for summary judgment de novo, applying the same legal standard used by the district court. *See Byers v. City of Albuquerque*, 150 F.3d 1271, 1274 (10th Cir. 1998). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. Pro. 56(c). We view the evidence, and all reasonable inferences drawn

> therefrom, in the light most favorable to the nonmoving party. *See Byers*, 150 F.3d at 1274.

McGarry v. Board of County Comm'rs, 175 F.3d 1193, 1198 (10th Cir. 1999).

Both Title VII and the ADEA, in similar language, make it unlawful to retaliate against an employee for engaging in certain protected activities. *See* 42 U.S.C. § 2000e-3(a) (Title VII); 29 U.S.C. § 623(d) (ADEA).

"Title VII retaliation claims generally proceed under the *McDonnell Douglas* burden-shifting analysis." *McGarry*, 175 F.3d at 1201 (citing *Sauers v. Salt Lake County*, 1 F.3d 1122, 1128 (10th Cir. 1993)); *see also McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). The same standard applies to ADEA retaliation claims. *See Anderson v. Phillips Petroleum Co.*, 861 F.2d 631, 634 (10th Cir. 1988); *see also Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993) (clarifying the showing of intent required to prove discrimination). The familiar *McDonnell Douglas* framework consists of plaintiff's prima facie case, defendant's neutral reason for its action, and plaintiff's rebuttal of the neutral reason by means of pretext evidence. *See, e.g.*, *Butler v. City of Prairie Village*, 172 F.3d 736, 747-48 (10th Cir. 1999). We therefore examine in turn each aspect of this analysis of circumstantial evidence of retaliatory motive.

A. Prima Facie Case

The district court found Shinwari had failed to establish a prima facie case of retaliation under the ADEA, although it found Raytheon had failed to carry its summary judgment burden as to Shinwari's prima facie case of Title VII national origin retaliation. To establish a prima facie case of retaliation under either statute, a plaintiff "must show: (1) that he engaged in protected opposition to discrimination; (2) adverse action by [defendant] subject to the protected activity; and (3) a causal connection between [plaintiff's] protected opposition and the adverse action." *McGarry*, 175 F.3d at 1201 (citing *Griffith v. Colorado*, 17 F.3d 1323, 1331 (10th Cir. 1994); *Archuleta v. Colorado Dep't of Insts.*, 936 F.2d 483, 486 (10th Cir. 1991)).

1. Protected opposition

a. Participation

Title VII establishes two categories of protected activity: participation and opposition. *See* 42 U.S.C. § 2000e-3(a) (prohibiting retaliation because an employee "has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter"). Because the retaliation provision of the ADEA, 29 U.S.C. § 623(d), is identical in all material respects to the retaliation provision of Title VII, 42 U.S.C. § 2000e-3(a), we readily discern congressional intent to approach the two provisions in an identical manner. *See* 8 Lex K. Larson, Employment Discrimination, § 129.01, at 129-1 to 129-2 & n.2 (2d ed. 1999).

The participation clauses prohibit an employer from retaliating "against an employee or applicant for employment because she 'made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." *Brower v. Runyon*, 178 F.3d 1002, 1005 (8th Cir. 1999) (quoting 42 U.S.C. § 2000e-3(a)) (emphasis omitted). "Conduct is only protected, however, if it qualifies as participation 'in any manner' in a Title VII 'investigation, proceeding, or hearing.' " *Id.* (quoting 42 U.S.C. § 2000e-3(a)). "The participation clause is designed to ensure that Title VII protections are not undermined by retaliation against employees who use the Title VII process to protect their rights." *Id.* at 1006 (citing *Hashimoto v. Dalton*, 118 F.3d 671, 680 (9th Cir. 1997)). Because of this purpose, "[a] plaintiff may maintain an action for retaliation based on participation in a protected proceeding regardless of whether the conduct forming the basis of her underlying complaint is adjudged to violate Title VII." *Jeffries v. Kansas*, 147 F.3d 1220, 1231 (10th Cir. 1998) (citing *Archuleta*, 936 F.2d at 487; *Wyatt v. City of Boston*, 35 F.3d 13, 15 (1st Cir. 1994)). As noted above, the same analysis applies with respect to claims under the anti-retaliation clauses of the ADEA, 29 U.S.C. § 623(d).

Shinwari argues that his internal complaints within the company are protected under the participation prong of the retaliation provision. This argument is without merit. Complaints to management, even informally, can under some circumstances be sufficient to invoke the participation clause. *See Jeffries*, 147 F.3d at 1231 & n.9. The facts of this case, however, fall far short of those in *Jeffries*. There, the plaintiff delivered a letter to the superintendent of her employer hospital describing acts of sexual harassment, a letter the hospital treated as a formal complaint and assigned EEO representatives to address. *See id.* at 1226. Here, Shinwari's allegations of discrimination were simply conclusory statements offered against his own performance review, without sufficient detail for the company or the EEOC to know what to investigate. The Eighth Circuit has held that

> [n]ot all discussions with individuals who are part of the Title VII grievance process or all informal complaints will amount to participation in a Title VII proceeding, however. At a minimum there would have to be factual allegations of discrimination against a member of a protected group and the beginning of a proceeding or investigation under Title VII.

Brower, 178 F.3d at 1006 (citing *Ghane v. West*, 148 F.3d 979, 982 (8th Cir. 1998)). We reject the contention that the fact that no investigation ensued will always automatically defeat application of the participation clause, because serious problems would undoubtedly arise if an EEO counselor declined to investigate claims that, unlike Shinwari's, included specific factual allegations. We decline, however, to extend the Title VII and ADEA participation clauses to include generalized and cursory complaints, unsupported by specific factual allegations, to an employer when those cursory complaints are neither related to, nor would reasonably lead to a proceeding provided for by statute.

b. Opposition

"The [Title VII] retaliation provision also contains an 'opposition clause' which prohibits retaliation against an employee or applicant for employment because she 'opposed any practice made an unlawful employment practice by this subchapter.' " *Brower*, 178 F.3d at 1005 n.3 (quoting 42 U.S.C. § 2000e-3(a)). As previously noted, we apply a similar analysis to ADEA retaliation claims.

Because the record before us could support a conclusion that Shinwari engaged in opposition to alleged discrimination, but not that he participated in proceedings under the relevant statutes, he must therefore show that his opposition was to at least a perceived practice prohibited by either Title VII or the ADEA. We have held that "opposition activity is protected when it is based on a mistaken good faith belief that Title VII has been violated." *Love v. RE/MAX of Am., Inc.*, 738 F.2d 383, 385 (10th Cir. 1984) (citations omitted).

The district court mischaracterized our standard when it stated that the belief that antidiscrimination law has been violated must not only be subjectively in good faith but objectively reasonable, citing Eleventh Circuit authority. *See Little v. United Techs.*, 103 F.3d 956, 960 (11th Cir. 1997). However, our Circuit's standard requires only a subjectively good faith belief. *See Jeffries*, 147 F.3d at 1231; *Love*, 738 F.2d at 385; *see generally* 2 Larson, Employment Discrimination, § 34.03[2], at 34-36 to 34-41 and nn.54-60 (noting that the First and Tenth Circuits have adopted a good faith belief test, by contrast to the Eleventh Circuit's reasonableness test, and only the Second and Seventh Circuits require both good faith and reasonableness). Under *Love*, 738 F.2d at 385, the only question in determining whether Shinwari's complaints of discrimination constituted protected opposition is whether those complaints were made in good faith.

Raytheon offers considerable evidence of older and Pakistani employees being reviewed and paid well to rebut Shinwari's ultimately abandoned discrimination claims, undermining the objective reasonableness of those claims. Shinwari points to several instances, however, apart from his own adverse evaluations and alleged under-compensation, which he maintains led him to develop a good faith belief in both age and national origin discrimination. These were:

> (1) plaintiff's belief that his 1996 performance evaluation reflected bias toward older employees; (2) Arnold's comment about plaintiff's salary; (3) the fact that "there was one time" when Arnold did not let plaintiff, Seely or Davidson participate in a presentation to "very upper management;" (4) plaintiff's belief that Seely, Davidson, Ungezene and other unidentified over-40 engineers had been demoted or relieved of leadership responsibilities; (5) the fact that Raytheon selected Gaines, rather than plaintiff, as lead engineer on the environmental control system team; and (6) a conversation where Seely told plaintiff that he was not happy with his performance evaluation.

(I Appellant's App. Doc. 3 at 22.)

Review of the record reveals that Shinwari's allegations of discrimination are generally vague, conclusory, and unsupported by specific factual instances. Nevertheless, there are claims which arguably could support a good-faith, albeit mistaken, belief that Raytheon was engaged in age discrimination. Specifically, he points to responsibility being taken away from a fifty-seven-year-old employee, Ted Seely, and to one instance when Arnold announced he was going to give the opportunity to make a presentation to "the younger leads." (III Appellant's App., Shinwari Dep. at 445.) Although Raytheon points to facts indicating that these instances were not discriminatory, its arguments are not so patently obvious as to persuade us that no reasonable fact-finder could consider Shinwari's alleged belief to have been in good faith. We note, however, that all Shinwari's cited instances pertain to alleged age, and not national origin, discrimination. The district court nevertheless found in favor of Shinwari as to protected activity under Title VII, based on Raytheon's failure to address facts specific to his Title VII retaliation claim. Because Raytheon's Title VII argument on appeal is likewise restricted to the issue of pretext, and because we agree with the district court on the dispositive question of pretext, we do not disturb the lower court's conclusion that Raytheon failed to carry its burden as summary judgment movant on this point.

2. Adverse Action

Raytheon concedes that Shinwari's termination qualifies as an adverse action for the purposes of establishing a prima facie case of unlawful retaliation.

3. Causation

To develop a prima facie case of retaliation, a plaintiff must show not only protected activity and adverse action, but also a causal relationship between the two. "The requisite causal connection may be shown by producing 'evidence of circumstances that justify an inference of retaliatory motive, such as protected conduct closely followed by adverse action.' " *McGarry*, 175 F.3d at 1201 (quoting *Burrus v. United Tel. Co. of Kan.*, 683 F.2d 339, 343 (10th Cir. 1982)). "Unless the termination is very closely connected in time to the protected conduct, the plaintiff will need to rely on additional evidence beyond mere temporal proximity to establish causation." *Conner v. Schnuck Markets, Inc.*, 121 F.3d 1390, 1395 (10th Cir. 1997). The district court properly found sufficient temporal proximity to establish an inference of causation, but found that inference refuted by of lack of evidence of knowledge of Shinwari's complaint by the relevant decision-makers. While it is apparent that protected activity cannot bear a causal relationship to adverse action if those taking the action were unaware of the existence of the protected action, we disagree with the district court's conclusion that the summary judgment materials cannot support an inference of such awareness.

The district court's conclusion that Raytheon had refuted causation, in the context Shinwari's ADEA claim, by showing a lack of knowledge on the part of the relevant decision-makers relied in part on deponent Bruner's retraction of his deposition testimony in a correction, as noted in the district court's order at 17 n.19. During his deposition, Bruner stated that "[a]t some point in time we received a document from Mohammad stating that he had been — he felt he had been discriminated against." (III Appellant's App., Bruner Dep. at 135.) At that point, Shinwari's counsel handed Bruner a copy of Shinwari's January 13, 1997, e-mail to Long, which alleged "I strongly believe that I am . . . discriminated against, because of my age and other background." (II Appellant's App. at 22-23). Bruner stated that "[y]es, this is the one I am talking about," and explained that he probably discussed it with Kavie, Gaines, and Arnold. (III Appellant's App., Bruner Dep. at 135.) When asked "when that conversation took place," he responded "probably . . . the day this came out, because this is the sort of thing that would probably generate some response among the recipients." (*Id.* at 136.) When asked how he got a document addressed only to Long, he replied "[m]aybe Nita gave me a copy, I don't know, but I got a copy." (*Id.*) This deposition testimony, viewed in the light most favorable to Shinwari, supports an inference that Bruner received the note from Long — and discussed it with Gaines, Kavie, and Arnold — around January 13, 1997, although Long denies having given it to anyone until the EEOC investigation.

In his deposition corrections, Bruner changed the answer to the question regarding when he saw the January 13, 1997, e-mail to Long to read "[w]e had that conversation during the time we were preparing for the interviews with the EEOC investigator." (I Appellee's Supp. App. at 161.) The district court relied on this correction to conclude that no one other than Long — i.e. no decision-makers with respect to Shinwari — saw the January 13, 1997, e-mail until after Shinwari's termination.

Shinwari argues, however, that Fed. R. Civ. P. 30(e), permitting deposition corrections, does not render previous testimony inadmissible, citing *Podell v. Citicorp Diners Club, Inc.*, 112 F.3d 98, 103 (2d Cir. 1997). This is the appropriate rule, particularly when a deponent attempts to use correction to eliminate a substantively harmful statement, rather than to correct problems such as transcription errors. Under such circumstances, "[t]he original answer to the deposition questions will remain part of the record and can be read at the trial." *Id.* (citations omitted). The possibility of impeachment of Bruner with his original testimony, therefore, would appear to create at least a dispute of material fact as to knowledge of the January 13 e-mail on the part of Bruner, and — viewing the evidence in the light most favorable to Shinwari — Gaines, Kavie, and Arnold as well.

The January 13, 1997, e-mail, refers clearly to alleged age discrimination, but also mentions discrimination because of Shinwari's "other background." (II Appellant's App. at 23.) As to Shinwari's November 27, 1996, note to Long, specifically mentioning national origin discrimination, Long denies its circulation to anyone else prior to Shinwari's termination. Bruner's testimony is that he cannot recall when he first saw that document, that is, "whether [it] was before or after Mr. Shinwari's termination." (III Appellant's App., Bruner Dep. at 137.) Additionally, although Shinwari's deposition testimony is vague on the point, it creates a factual dispute as to whether he made oral allegations of some type of discrimination at the November 15, 1996, meeting with Long, Arnold, and Bruner. Viewing all this evidence in the light most favorable to Shinwari, we conclude it could support an inference of knowledge and therefore causation as to claims of both age and national origin discrimination.

Therefore, we conclude that "for purposes of summary judgment, the[ ] evidence and the reasonable inferences drawn therefrom, together with the close temporal relationship" between Shinwari's complaints of discrimination and his termination, "demonstrate that [Shinwari] has met his burden of establishing a prima facie case of retaliation." *McGarry*, 175 F.3d at 1201 (citing *Candelaria v. EG & G Energy Measurements, Inc.*, 33 F.3d 1259, 1261-62 (10th Cir. 1994)).

B. Defendant's Neutral Reason

"As with discrimination claims, once the plaintiff has established a prima facie case of retaliation, the employer has the burden of coming forth with a legitimate, nondiscriminatory reason for its adverse action." *Butler*, 172 F.3d at 752 (citing *Sauers*, 1 F.3d at 1128). Once Shinwari established his prima facie case of retaliation, the burden shifted to Raytheon to show a legitimate reason for his termination. *See McGarry*, 175 F.3d at 1201. Raytheon has met this burden. Although Shinwari raises factual disputes over specifics, given the nature of the employer's burden at this stage, there is enough uncontroverted evidence of perceived deficient performance to require pretext evidence.

C. Pretext

Once the defendant presents evidence of a neutral reason, "even though a plaintiff has established a prima facie case, the defendant is entitled to summary judgment unless the plaintiff produces either direct evidence of discrimination or evidence that the defendant's proffered reason for the action taken was pretextual." *Conner*, 121 F.3d at 1397. Following presentation of evidence of the defendant's neutral reason, " 'the presumption of [impermissible motive] simply drops out of the picture,' " and the analysis shifts to the plaintiff's ultimate burden of showing that the defendant took action on an illegal basis — in this case, retaliation for protected activity. *Id.* at 1396 (quoting *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 510-11 (1993)). The plaintiff may then resist summary judgment if she can present evidence that the proffered reason was pretextual, "i.e. unworthy of belief," *Randle v. City of Aurora*, 69 F.3d 441, 451 (10th Cir. 1995), or "otherwise introduces direct evidence of illegal . . . motive," *id.* at 453. "Effective cross-examination, combined with the plaintiff's initial evidence, may be sufficient to effect this task." *Roberts v. Roadway Express, Inc.*, 149 F.3d 1098, 1103 (10th Cir. 1998) (citations omitted); *see also Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 255 n.10 (1981). "To avoid summary judgment, a plaintiff need not demonstrate that [impermissible] reasons motivated the employer's decision." *Morgan v. Hilti, Inc.*, 108 F.3d 1319, 1321-22 (10th Cir. 1997) (citation omitted). Rather, he or she must simply point to facts that could lead a reasonable jury to disbelieve the employer's proffered reason. *See Butler*, 172 F.3d at 750-51.

Allegations of retaliation do not relieve a plaintiff of this burden, which can be met either by direct evidence of retaliatory motive or by showing that the employer's reasons were pretextual. *See Conner*, 121 F.3d at 1396-97. Temporal proximity between protected activity and adverse action may combine with additional circumstantial evidence to create a fact issue as to pretext. *See Butler*, 172 F.3d at 752. This is not the case here, because Shinwari points to virtually no additional evidence, resting principally on his prima facie case. Shinwari's argument on this point was rejected in *Conner*, 121 F.3d at 1397-98.[2] As noted in the unpublished case of *Trujillo-Cummings v. Public Serv. Co.*, No. 97-2337, 1999 WL 169336, at **3 (10th Cir. March 29, 1999):

> The fact that temporal proximity may support an inference of causation sufficient to establish a plaintiff's prima facie case does not automatically demonstrate that a defendant's proffered justifications are pretextual. While a discharge is retaliatory if "the immediate cause or motivating factor of a discharge is the employee's assertion of statutory rights," *Martin v. Gingerbread House, Inc.*, 977 F.2d 1405, 1408 (10th Cir. 1992) (citations and footnote omitted), appellant confuses the inference of causation sufficient to establish a prima facie case of [retaliation] with her ultimate burden of proving that the protected action was indeed the cause of the discharge. Once the employer meets the second step of *McDonnell Douglas*, the inference of causation drops out, and a plaintiff does not carry his or her burden until

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[2] We recognize that our discussion of retaliation in *Marx v. Schnuck Markets, Inc.*, 76 F.3d 324, 329 (10th Cir. 1996), which did not examine in detail the *McDonnell Douglas* framework, has led litigants to contend that case stands for the proposition that a prima facie case, in the retaliation context, necessarily also establishes pretext. However, the court in *Conner*, 121 F.3d at 1398, specifically rejected such a reading of *Marx*.

> he or she offers some evidence of pretext in the employer's legitimate reason. *See Conner*, 121 F.3d at [1398] (refusing to read *Marx* as "holding that protected conduct closely followed by adverse action always justifies an inference of retaliatory motive, and thus summary judgment is always inappropriate when temporal proximity is established").

In his reply brief, Shinwari relies on *Butler*'s holding that, in certain cases, temporal proximity between protected activity and adverse action may be insufficient to create an inference of retaliatory motive, but with additional evidence may nevertheless create a fact issue as to pretext. *See Butler*, 172 F.3d at 752. He argues that *Butler* allows him to rest his pretext argument entirely on the temporal proximity evidence here *sufficient* to establish the causation prong of the prima facie case. In *Butler*, however, "additional circumstantial evidence," of pretext was present. *Id.* In that case, the proffered neutral justification for the plaintiff's termination was that his position was eliminated pursuant to a reorganization. Evidence of pretext included resurrection of the plaintiff's former duties in a new position and the fact that his was the only position eliminated while it was occupied. *See id.* These facts represented substantial circumstantial evidence of pretext, making temporal proximity merely an additional factor and not a complete substitute for pretext evidence. *See id.* Shinwari does not offer such evidence suggesting that his adverse evaluations and termination were pretextual, apart from their temporal proximity to his alleged complaints. If this were enough, the burden-shifting scheme of *McDonnell Douglas* would be effectively eliminated in retaliation cases, and this Circuit has already rejected such an approach. *See Conner*, 121 F.3d at 1398.

Shinwari's reliance, in his reply brief, on *McGarry*, 175 F.3d at 1200-02, is likewise misplaced. That case, like *Butler*, involved additional evidence of pretext apart from temporal proximity alone — notably the employer's failure to keep the plaintiff's application on file and reconsider it for a new opening following a specific promise to do so. *See id.* at 1202.

Shinwari contends that he did present "additional circumstantial evidence" of pretext, *Butler*, 172 F.3d at 752: namely, the sudden drop in his job evaluations and the credibility issue created by Bruner's subsequent retraction of deposition testimony. Although Shinwari's evaluations did drop precipitously between his September 1996 annual evaluation and his special performance review only a few months later, Raytheon cites to extensive and unrefuted record evidence supporting such a re-evaluation. Moreover, the comments on Shinwari's September 1996 regular review regarding errors and sensitivity to criticism reveal that Arnold and Bruner were aware that problems of careless work and difficulty in dealing with criticism were ongoing — problems that are consistent with those identified in the special performance review.

More importantly, Shinwari has produced no evidence that Raytheon's explanation of the underlying cause of the abrupt drop in performance evaluation lacks credibility. Indeed, while he maintains that there are factual disputes as to the errors and instances of insubordination at issue, review of the record reveals that the only dispute arises from Shinwari's subjective evaluations of his own performance. While Shinwari's deposition is replete with broad contentions such as one that anyone in the aircraft industry would confirm that he is one of the finest engineers in that industry, such confirmation is conspicuously absent from the record — as is any affidavit or deposition testimony by anyone other than Shinwari himself confirming that his calculations were correct or his behavior acceptable. Highly generalized and self-serving evaluations of one's own performance are not sufficient to create a genuine issue of material fact as to the sincerity, as opposed to the correctness, of an employer's negative performance evaluation. *See, e.g.*, *Fallis v. Kerr-McGee Corp.*, 944 F.2d 743, 747 (10th Cir. 1991) (holding that "a plaintiff cannot prevail by merely challenging in general terms the accuracy of a performance evaluation which the employer relied on in making an employment decision without any additional evidence (over and above that of the prima facie case)" (citing *Branson v. Price River Coal Co.*, 853 F.2d 768, 772 (10th Cir. 1988)).

The more difficult question, in our view, is whether Bruner's amendment of his deposition testimony regarding his receipt of Shinwari's January 13, 1997, e-mail alleging discrimination might suffice to call into question the sincerity of Raytheon's professed motive for terminating Shinwari. Viewing the evidence in the light most favorable to Shinwari, we conclude that cross-examination of Bruner as to the discrepancy between his initial statement and the later correction could lead to an inference that he was seeking to conceal his knowledge of Shinwari's complaint of discrimination. As discussed above, such an inference supports the causation element of Shinwari's prima facie case, but we are not persuaded that this fact alone suffices to carry the day on the question of pretext. Viewing the entirety of the evidence in context, we conclude that this single isolated inconsistency is not sufficient to undermine the sincerity of Raytheon's professed motive for taking adverse action, particularly as the inconsistency at issue is not immediately related to that professed motive, and does nothing to undermine the allegations of deficient performance by Shinwari's other supervisors, whose credibility is not similarly undermined. Such a view is bolstered by the fact that not Bruner, but rather Kavie, participated in the initial decision to terminate Shinwari. In short, taking the facts in the light most favorable to Shinwari, even if Bruner was aware of Shinwari's January 13, 1997, e-mail but tried to conceal that awareness, in the context of the totality of the facts in the record before us, that single fact is not sufficiently material to the specific reasons proffered for Shinwari's termination to establish pretext without some additional evidence thereof.

Shinwari relies on *Dey v. Colt Construction & Development Co.*, 28 F.3d 1446, 1460-61 (7th Cir. 1994), for the proposition that this inconsistency constitutes sufficient evidence of pretext to prevent summary judgment. (*See* Appellant's Br. at 25.) In *Dey*, however, the court found evidence sufficient to support an inference of pretext based on specific refutations of particular instances of alleged misconduct, corroborated by the testimony of co-workers. *See id.* Here, Shinwari, unlike Dey, denies none of the incidents cited by Raytheon as grounds for his termination, but simply maintains, without corroboration, that he was in the right in each of them. The only "denials of knowledge of a complaint," (Appellant's Br. at 25,) at issue in the pretext analysis in *Dey* were denials by a supervisor that other employees had complained to him about alleged deficiencies in the plaintiff's performance, and therefore that case simply does not affect the separate issue of whether a manager's denial of receipt of a discrimination complaint — called into question by inconsistent deposition testimony — automatically suffices in and of itself as evidence of pretext in a retaliation case. The text of *Dey* cited by Shinwari, *see* 28 F.3d at 1459, deals with the distinct issue of the relevance of a disputed denial of receipt of a complaint to the question of whether an employer was *aware* of the protected activity. *See id.* at 1458-59. Therefore, we conclude that *Dey* is not applicable to the particular question before us.

While there certainly may be cases where a manager's rebutted denial of knowledge of an employee's complaint would be sufficient to question the sincerity of the manager's professed motives for terminating the employee, *see Roberts*, 149 F.3d at 1103, this is not such a case. As we have often stated, the pretext inquiry is highly fact-specific. *See Conner*, 121 F.3d at 1398. Based on review of the summary judgment materials before us, we conclude that the evidence of Shinwari's deficient performance is so overwhelming and unrefuted that the single inconsistency in Bruner's deposition testimony cannot suffice to carry Shinwari's burden of showing pretext at the summary judgment stage.

III

The judgment of the district court is **AFFIRMED**.

ENTERED FOR THE COURT

Carlos F. Lucero
Circuit Judge

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS DATED AND FILED OCTOBER 15, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

CIVIL ACTION
No. 97-2617-KHV

MOHAMMAD M. SHINWARI,

Plaintiff,

v.

RAYTHEON AIRCRAFT COMPANY,

Defendant.

MEMORANDUM AND ORDER

Plaintiff, a former employee of Raytheon Aircraft Company ("Raytheon"), brought suit under Section 1981, Title VII, the ADEA, and state common law, alleging employment discrimination, retaliation, and breach of contract. On July 23, 1998, the Court sustained defendant's motions for summary judgment and partial dismissal. *See Shinwari v. Raytheon Aircraft Co.*, __ F. Supp. 2d __, 1998 WL 596343 (D. Kan. July 23, 1998). The matter now comes before the Court on *Plaintiff's Rule 59(e) Motion To Reconsider And Thereby Alter, Amend And Vacate The Order Of Summary Judgment Entered July 24, 1998* (Doc. #90) filed August 7, 1998. Plaintiff contends that reconsideration is necessary to correct the Court's misapprehension of the law and the relevant facts. For reasons set forth below, the motion is overruled.

Legal Standards

The Court has discretion whether to grant or deny a motion for reconsideration.[1] *Hancock v. City of Oklahoma City*, 857 F.2d 1394, 1395 (10th Cir. 1988); *Torre v. Federated Mut. Ins. Co.*, 906 F. Supp. 616, 617-18 (D. Kan. 1995). The Court may recognize any one of three grounds justifying reconsideration: an intervening change in controlling law, availability of new evidence, or the need to correct clear error or prevent manifest injustice. *Martin v. Mapco Ammonia Pipeline, Inc.*, 866 F. Supp. 1304, 1308 (D. Kan. 1994); *Marx v. Schnuck Mkts., Inc.*, 869 F. Supp. 895, 897 (D. Kan. 1994). *See also Anderson v. United Auto Workers*, 738 F. Supp. 441, 442 (D. Kan. 1990) (motion to reconsider appropriate when court has obviously misapprehended party's position, facts, or applicable law, or when party introduces new evidence that could not have been obtained through exercise of due diligence).

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[1] The Federal Rules of Civil Procedure do not recognize motions for reconsideration. *See Hatfield v. Board of County Comm'rs*, 52 F.3d 858, 861 (10th Cir. 1995); *Loum v. Houston's Restaurants, Inc.*, 177 F.R.D. 670, 671 (D. Kan. 1998). While the Rules of Practice and Procedure for the District of Kansas contain a provision entitled "Motions to Reconsider," D. Kan. Rule 7.3, this provision is intended to apply only to non-dispositive judgments and orders. 177 F.R.D. at 671 (citation omitted). Nevertheless, a motion to alter or amend is essentially a motion for reconsideration. *Hilst v. Bowen*, 874 F.2d 725, 726 (10th Cir. 1989); *Koch v. Shell Oil Co.*, 911 F. Supp. 487, 489 (D. Kan. 1996).

A motion to reconsider is not a second chance for the losing party to make his strongest case or to dress up arguments that previously failed. *Voelkel v. General Motors Corp.*, 846 F. Supp. 1482, 1483 (D. Kan.), *aff'd*, 43 F.3d 1484 (10th Cir. 1994). Such motions are not appropriate if the movant only wants the Court to revisit issues already addressed or to hear new arguments or supporting facts that could have been presented originally. *Van Skiver v. United States*, 952 F.2d 1241, 1243 (10th Cir. 1991), *cert. denied*, 506 U.S. 828 (1992).

Factual Background

The Court's order of July 23, 1998, sets forth a chronology which traces the evolution of plaintiff's claims throughout the history of this dispute, as well as a detailed summary of the factual background. *See Shinwari*, 1998 WL 596343, at *2-9. In the analysis below, we address only those factual and legal issues which are relevant to plaintiff's motion for reconsideration.

Analysis

I. Did The Court Improperly Dismiss Plaintiff's Retaliation Claim Under Section 1981?

Upon examination of the Pretrial Order in this case, the Court determined that plaintiff had abandoned any claim of retaliation based on protected opposition to discrimination on account of color, under 42 U.S.C. § 1981. Plaintiff challenges the "dismissal" of this claim, arguing that the factual record does not support the Court's "claim" that he opposed discrimination on the basis of age and national origin but not on the basis of color.[2] Counts II and III of the complaint, he contends, clearly allege discrimination based on race and color.

On April 20, 1998, the Court held a pretrial conference which allowed plaintiff to clarify his claims. Plaintiff's claims are now memorialized in the *Pretrial Order* (Doc. #58) filed April 21, 1998. The Pretrial Order clearly states that "this Pretrial Order shall supersede pleadings and control the future course of the action unless modified to prevent injustice." *Id.* at 24. *See also* D. Kan. Rule 16.2(c) (pretrial order, when approved by the court and filed with clerk, controls subsequent course of action unless modified by consent of parties and court); *Hernandez v. Alexander*, 671 F.2d 402, 407 (10th Cir. 1982) (pretrial order supersedes pleadings and becomes governing pattern of suit). Because the Pretrial Order supersedes the complaint, plaintiff's citations to the latter are unavailing.

Plaintiff further argues that the Pretrial Order "reiterates" his claim that defendant subjected him to discrimination in violation of Section 1981, in that it sets forth the elements of a cause of action for discrimination — the third element of which requires plaintiff to show that "the adverse employment action he suffered was 'motivated by his national origin and ***color***.' " *Memorandum In Support Of Plaintiff's Rule 59(e) Motion To Reconsider*, p.2 (emphasis in original) ("Motion To Reconsider").[3] Merely identifying the elements of a cause of action for discrimination, one of which refers to "national origin or color," is not enough; at a minimum, plaintiff must also identify how his color in fact motivated Raytheon. *See, e.g., Celotex*, 477 U.S. at 322 (under Rule 56 movant entitled to judgment as a matter of law should nonmoving party insufficiently establish an essential element of a claim for which nonmovant has the burden); *Enfinger v. Wolf Creek Nuclear Operating Corp.*, No. 95-4071, 1995 WL 783211, at *3 (D. Kan. Oct. 27, 1995) (plaintiff's complaint must set forth factual allegations, either direct or inferential, respecting each material element necessary to sustain recovery under some actionable legal theory) (citation omitted). Plaintiff did not do so. In the portions of the Pretrial Order which immediately follow, plaintiff makes no reference to color or race. Instead, he merely states that "plaintiff is a member of a protected group: His Nation of origin is Pakistan — he is not a native-born American citizen." *Pretrial Order*, p.10. Because the Pretrial Order contains no allegations that Raytheon subjected plaintiff to discrimination (or retaliation) on the basis of his race or color, "dismissal" of his Section 1981 retaliation claim was appropriate.

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[2] Plaintiff's arguments on this issue are unclear. He contends that the Court improperly dismissed his Section 1981 claim for retaliation based on color, but then advances arguments regarding claims for discrimination based on color. Plaintiff's arguments regarding discrimination, even if correct, do not establish that "dismissal" of his Section 1981 retaliation claim was improper. The Court need not further address this argument.

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[3] The Pretrial Order actually states that the adverse action must be motivated by plaintiff's "national origin *or* color." *Pretrial Order*, p.10 (emphasis added).

Plaintiff apparently argues that national origin, race and color are interchangeable and that his claim based on national origin is therefore also by definition a claim based on race or color. In support, plaintiff cites *Daemi v. Church's Fried Chicken, Inc.*, where the Tenth Circuit said:

> [A]ctually § 1981 does not outlaw national origin discrimination per se, only discrimination on the basis of race. *Saint Francis College v. Al-Khazraji*, [481 U.S. 604, 613 (1987)]; *see* M. Player, Employment Discrimination Law § 8.02 (1988). We are cognizant, however, that often the line between national origin discrimination claims under Title VII and racial discrimination claims under § 1981 is "not a bright one." *Saint Francis College*, 481 U.S. at 614 (Brennan, J., concurring). The concept of race under § 1981 is broad. It extends to matters of ancestry which are normally associated with nationality, not race in a biological sense. *See Alizadeh v. Safeway Stores, Inc.*, 802 F.2d 111, 114-15 (5th Cir. 1986) (noting that persons of Iranian descent are a protected race under § 1981, although anthropologists classify them as Caucasian); *Manzanares v. Safeway Stores, Inc.*, 593 F.2d 968, 971 (10th Cir. 1979) (noting that § 1981 is "no[t] necessarily limited to the technical or restrictive meaning of 'race' ") [citation omitted]. As the Supreme Court has noted, Congress intended § 1981 to "protect from discrimination identifiable classes of persons who are subjected to intentional discrimination solely

> because of their ancestry or ethnic characteristics." *Saint Francis College*, 481 U.S. at 613 . . . . As a person of Iranian descent, Daemi was protected by § 1981's bar against discrimination on the ground of race. *E.g., Alizadeh*, 802 F.2d at 114-15. *His pleadings indicate that he in fact sought § 1981 relief on this ground.*

931 F.2d 1379, 1387, n.7 (10th Cir. 1991) (emphasis added). In this case plaintiff seeks Section 1981 relief solely on the basis of the place or nation of his origin, not on the basis of his race, ancestry, or ethnic characteristics. *See, e.g., Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 613 (1987) (plaintiff must prove discrimination based on fact that he was born an Arab, "rather than solely on the place or nation of his origin, or his religion"); *Aramburu v. Boeing Co.*, 112 F.3d 1398, n.2 (10th Cir. 1997) (discrimination claim based on Mexican-American ancestry fell within Section 1981's protection against racial discrimination; "Section 1981 does not protect individuals from discrimination based on national origin"). Throughout the Pretrial Order, plaintiff refers only to national origin and age; nowhere does he contend that Raytheon retaliated against him as a result of protected opposition to discrimination based on color, race, ancestry, or ethnicity. *Pretrial Order*, pp.3-9 ("Plaintiff's Factual Contentions"), and 9-11 ("Plaintiff's Legal Contentions"). Instead he contends that Raytheon retaliated against him because he had complained about "unlawful discrimination," *id.* at 10-11, and that the complaint about unlawful discrimination involved age and national origin, *id.* at 5, 8, 10. Accordingly, the Court did not err in finding that plaintiff had either abandoned or failed to assert a

retaliation claim under Section 1981 based on protected opposition to discrimination on account of color.

II. Did The Court Analyze Plaintiff's Title VII Retaliation Claim Under The Wrong Standard?

Plaintiff argues that the Court analyzed his Title VII retaliation claim under the wrong standard, *i.e.* the opposition clause instead of the participation clause. 42 U.S.C. § 2000e-3(a) provides in relevant part:

> It shall be an unlawful employment practice for an employer to discriminate against any of [its] employees because [the employee] has opposed any practice made an unlawful employment practice by this subchapter, or because [the employee] has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

Plaintiff claims that under the participation clause, he need not have had a reasonable good faith belief that Raytheon had engaged in unlawful discrimination; instead, he need only have opposed Raytheon's activities by making an informal complaint to management. In support of his argument, plaintiff cites *Jeffries v. State of Kansas, Department of Social and Rehabilitation Services*, a recent Tenth Circuit decision. In *Jeffries* the Tenth Circuit held that "a plaintiff may maintain an action for retaliation based on participation in a protected proceeding regardless of whether the conduct forming the basis of her underlying complaint is adjudged to violate Title VII." 147 F.3d 1220, 1231

(10th Cir. 1998). The court also cited a First Circuit case which held that "there is nothing in [the] wording [of the statute] requiring that the charges be valid, nor even an implied requirement that they be reasonable." *Wyatt v. City of Boston*, 35 F.3d 13, 15 (1st Cir. 1994) (citation omitted).

We fail to see the logic in plaintiff's argument. Plaintiff does not contend, nor does the record reflect, that Raytheon fired him after he "made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." *See, e.g.*, *Corneveaux v. Cuna Mut. Ins. Group*, 76 F.3d 1498, 1507 (10th Cir. 1996) (by filing charge of discrimination with state, plaintiff engaged in proceeding arising out of discrimination); *Vasconcelos v. Meese*, 907 F.2d 111, 113 (9th Cir. 1990) (purpose of participation clause to protect employee who "utilizes tools provided by Congress to protect his rights;" accusations made during employer's internal investigation not such participation) (9th Cir. 1990) (citation omitted); *Morris v. Boston Edison Co.*, 942 F. Supp. 65, 71 (D. Mass. 1996) (testimony during employer's internal investigation not participation).

Plaintiff's reliance on *Jeffries* does not change the nature of his retaliation claim, which is that Raytheon fired him on January 24, 1997, after he complained of discrimination to Raytheon management. *Shinwari*, 1998 WL 596343, at *19, n.26. Prior to April 21, 1997, when he filed his complaint with the EEOC, plaintiff did not make a charge, testify, assist, or participate in any manner in an investigation, proceeding, or hearing under Title VII. The only other action which potentially constituted participation in a proceeding under

Title VII began on December 3, 1997, when he filed this suit. Plaintiff's participation in these activities did not occur until *after* the alleged retaliation occurred, however, and it therefore cannot form the basis for his retaliation claim.

In any event, plaintiff's argument misses the mark. The Court did not sustain Raytheon's motion for summary judgment on plaintiff's Title VII retaliation claim on the ground that he did not engage in protected activity. On the contrary, the Court held that plaintiff had failed to establish a genuine issue of material fact whether Raytheon's stated reasons for his termination were pretextual. *See Shinwari*, 1998 WL 596343, at *19. Plaintiff does not challenge that aspect of the Court's decision. Accordingly, summary judgment on plaintiff's Title VII retaliation claim was appropriate.

III. Did The Court Properly Analyze Plaintiff's ADEA Retaliation Claim?

Plaintiff argues that the Court committed manifest factual errors which resulted in an improper finding that he did not engage in protected opposition to unlawful discrimination in violation of the ADEA. Plaintiff complains that the Court based its finding on allegations which are not consistent with his statement of material facts and which, according to plaintiff, "the Tenth Circuit has ruled ***must*** be accepted as true, and ***must*** be viewed in a light most favorable to the plaintiff." *Motion To Reconsider*, p.8 (emphasis in original).[4]

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[4] Plaintiff cites no authority for the proposition that a nonmovant's statement of facts *must* be accepted as true. On the

(Cont'd)

These arguments again miss the mark. As with plaintiff's Title VII retaliation claim, the Court held (in part) that Raytheon had articulated a legitimate reason for the employment action taken and that plaintiff could not point to evidence that the reason was merely pretextual. *See Shinwari*, 1998 WL 596343, at *14, n.23. Plaintiff does not challenge that aspect of the Court's decision. Accordingly, even if the Court clearly misapprehended the law or committed manifest errors of fact, plaintiff's motion to reconsider its ruling with respect to his ADEA retaliation claim must fail.

Moreover, the Court largely agrees with defendant's arguments on this issue, and therefore adopts those arguments in substance in this analysis. Even if it were necessary to reach plaintiff's arguments on this issue, the result would be the same. Although we are not obliged to do so, we address briefly certain aspects of plaintiff's arguments.

(Cont'd)

contrary, the local rules clearly provide that "[a]ll material facts set forth in the statement of the *movant* shall be deemed admitted for the purpose of summary judgment unless *specifically controverted* by the statement of the opposing party." D. Kan. Rule 56.1 (emphasis added). As the Court noted in its *Memorandum And Order*, the essential inquiry is "whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so one-sided that one party must prevail as a matter of law." *Shinwari*, 1998 WL 596343, at *1 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986)); *see also id.* at *6, n.10-11, 16 F. Supp. 2d 1308, 1319-21 (deeming certain of defendant's facts admitted due to plaintiff's failure to controvert such facts under D. Kan. Rule 56.1).

Plaintiff complains that "[h]ow the Court mistakenly framed the issues . . . is inexplicable," and states that the Court committed manifest factual errors in identifying six circumstances which formed the basis of his belief that Raytheon discriminated against him on the basis of age. According to plaintiff, the six circumstances which the Court identified are not ***his*** allegations, because they are inconsistent with the statement of material facts in his *Opposition To Defendant's Motion For Summary Judgment* (Doc. #71) filed June 1, 1998 ("Motion in Opposition"). We fail, however, to see a material discrepancy. The six circumstances identified in the *Memorandum And Order* are faithful to plaintiff's stated facts. *See Motion in Opposition*, pp.10-11, ¶¶ 50-54; 38.

Plaintiff now re-characterizes the grounds for his belief that Raytheon discriminated against him on the basis of age, but for the most part, plaintiff fails to cite record evidence in support of his revised allegations. *See* D. Kan. Rule 7.6(a) (all briefs and memoranda shall contain a concise statement of the facts, and each statement of fact should be supported by reference to the record). To the extent that plaintiff has failed to cite record evidence, he has not shown that the Court misapprehended the facts that support his position. *Anderson v. United Auto Workers*, 738 F. Supp. at 442 (motion to reconsider appropriate when, e.g., Court has obviously misapprehended a party's position or the facts).

Plaintiff complains that the Court did not consider his contention that Raytheon initially underpaid him on account of his age. Plaintiff did not make this argument, however, in opposition to defendant's motion for summary judgment; his statement of material facts merely cited his deposition testimony to that effect. A motion for reconsideration is not a forum for new arguments or supporting facts that could have been presented originally. *Van Skiver*, 952 F.2d at 1243.

Plaintiff also complains about the Court's "gross failure of logical reasoning" in its analysis of his claim that he and other older employees were passed over for promotions. Plaintiff proceeds, however, to challenge the Court's analysis regarding his claim that the September 1996 performance evaluation reflected bias toward older employees. Specifically, he challenges the footnote in which the Court stated, "plaintiff is not entitled to any *substantial* margin for error based on a hypothesis that he had limited knowledge about the factual and legal basis for his charges of discrimination," because he consulted with an attorney before making his accusations. *Shinwari*, 1998 WL 596343, at *11, n.22 (emphasis in original). The Court further stated that plaintiff is well educated, that his charges did not present any difficult legal concepts or require a sophisticated understanding of Title VII, and that no reasonable jury would conclude that his accusations involved fine legal points somehow beyond his ken. *Id.*

The Court simply noted these factors in light of *Moyo v. Gomez*, where the Ninth Circuit held that the assessment of the objective reasonableness of plaintiff's belief that an unlawful employment practice occurred is "one that makes due allowance . . . for the limited knowledge possessed by most Title VII plaintiffs about the factual and legal bases of their claims." 32 F.3d 1382, 1385-86 (9th Cir.), *amended by* 40 F.3d 982 (1994), *cert. denied*, 513 U.S. 1081 (1995) (erroneous belief that employer engaged in unlawful employment practice is reasonable and thus actionable under Title VII, if premised on mistake made in good faith, which may be one of fact or law). The Court properly considered these factors in its determination whether plaintiff's limited knowledge of the factual and legal bases for his claim resulted in a good faith, albeit mistaken, belief that Raytheon had engaged in unlawful activity.

Plaintiff also challenges the Court's citation to *Boyd v. Runyon*, No. 94-1557-JTM, 1996 WL 294330 (D. Kan. May 23, 1996) (plaintiff's opposition to employer's activity not viewed as reasonable though mistaken allegation of Title VII violation where plaintiff did not allege discrimination based on sex or other protected category). We cited *Boyd* in the context of the following digression: "[i]ndeed, plaintiff has abandoned all claims of discrimination in this case — a fact which tends to suggest that even today he lacks an objectively reasonable belief that Raytheon engaged in age discrimination against him." *Shinwari*, 1998 WL 596343, at *12. This digression was not determinative; rather, it merely reinforced the conclusion that plaintiff's belief was not objectively reasonable.

Plaintiff also complains that "[n]owhere does the plaintiff claim that his September 1996 Annual Performance Review reflected 'bias toward older employees' yet somehow, that is how the Court has framed the issue." *Motion To Reconsider*, p.11. Plaintiff is clearly in error. In his motion in opposition, plaintiff includes the following in his statement of material facts: "plaintiff believed that he received the Review he did out of bias aGainest [sic] older employees."

Motion In Opposition, p.10, ¶ 50. Plaintiff supported this fact by citing portions of his deposition testimony which addressed the September 1996 performance review. *See* Plaintiff's depo., pp.451 (lines 17-25), 452 (lines 1-23), 412 (line 25), and 413 (lines 1-5) ("[e]xhibit 8 is the salaried performance review, and it is done on 9-30-96 . . . .").

Plaintiff complains that the Court was "plain wrong" in finding that the record contains no evidence that Seely, Davidson, Ugezene or any other over-40 engineers were demoted or relieved of leadership responsibilities. Again, however, plaintiff fails to cite relevant record evidence in support of his allegation. Plaintiff further challenges the Court's finding that "[a]t the status conference held July 9, 1998, plaintiff's counsel admitted that Davidson, Seely and plaintiff did not receive demotions, but stated that plaintiff had believed they should have received *promotions* as more people joined the Hawker program." *Shinwari*, 1998 WL 596343, at *13 (emphasis in original). Plaintiff notes counsel's statement that "[w]hat happened to Ted Seely was that the lead responsibilities that he did have[ ]*were taken away*," and that "when it came time to reorganize, Davidson was again not put into any kind of supervisory position." *Motion To Reconsider*, p.11 (emphasis in original).

With respect to Seely, plaintiff fails to address the Court's finding that Kavie, the person who assumed Seely's position as lead, is older than Seely and ten years older than plaintiff. Even assuming that plaintiff could cite record support for his allegation, he proffers no explanation how Seely's demotion and replacement by an employee in the protected class could give rise to an objectively reasonable belief that age discrimination was the reason. As for Davidson, the statement by plaintiff's counsel that Davidson did not receive a promotion and was a member of the protected group does not constitute evidence that Davidson was demoted because of age. Plaintiff cites no evidence to establish that age was a factor, that Davidson was entitled to a promotion, or that a non-protected employee received the promotion in Davidson's stead.

Plaintiff also complains that the Court harbors hostility to employment discrimination claimants. Plaintiff notes the Court's comment during the status conference that "[b]y the same token, one thing that plaintiffs have learned to do over the years is scream . . . discrimination whenever they think that they're about to get adverse action." Transcript of Status Conference, July 9, 1998, p.17. Viewed in context, the Court's statement does not reflect hostility, and the Court does not believe that plaintiff's counsel sincerely thinks or thought otherwise.[5] The Court offered the statement in response to the contention of plaintiff's counsel that "what companies have learned to do over the years is to mask decisions they make that might have implications against older employees with things that on their face look to be legitimate non-discriminatory decisions." *Id.* Neither comment had any bearing on the Court's ruling, as the record contained no evidence in support of either observation.

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[5] Plaintiff's counsel in fact agreed with the Court's statement. The Court assumes that he would not have done so if he had genuinely understood the comment to reflect hostility to plaintiff, or to employment discrimination claimants as a whole.

Plaintiff complains that the Court impermissibly interjected its judgment in place of the jury's judgment, given the Court's finding that "the only permissible inference that reasonably flows from this record is that plaintiff manufactured a charge of discrimination to deflect attention from his performance problems." *Shinwari*, 1998 WL 596343, at *14. Plaintiff argues that the reasonable person "is *not* designed to resemble a Federal District Court Judge." *Motion To Reconsider*, p.14 (emphasis in original). This argument presents no coherent rationale which warrants reconsideration, and we do not address it further.

IT IS THEREFORE ORDERED that *Plaintiff's Rule 59(e) Motion To Reconsider And Thereby Alter, Amend And Vacate The Order Of Summary Judgment Entered July 24, 1998* (Doc. #90), filed August 7, 1998, be and hereby is **OVERRULED**.

Dated this 15th day of October, 1998, at Kansas City, Kansas.

s/ Kathryn H. Vratil
Kathryn H. Vratil
United States District Judge

APPENDIX C — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS DATED AND FILED JULY 23, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

CIVIL ACTION
No. 97-2617-KHV

MOHAMMAD M. SHINWARI,

Plaintiff,

v.

RAYTHEON AIRCRAFT COMPANY,

Defendant.

MEMORANDUM AND ORDER

On December 4, 1997, plaintiff filed suit against his former employer, Raytheon Aircraft Company, seeking damages for employment discrimination and retaliation in violation of 42 U.S.C. § 1981, and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, as amended; for retaliation under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*; and for breach of contract. This matter comes before the Court on defendant's *Motion For Partial Dismissal* (Doc. #24) filed January 12, 1998, and defendant's *Motion For Summary Judgment* (Doc. #62) filed April 29, 1998.

For reasons stated more fully below, the Court finds that both motions should be sustained.

Summary Judgment Standards

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fed.R.Civ.P. 56(c); *accord Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); *Vitkus v. Beatrice Co.*, 11 F.3d 1535, 1538-39 (10th Cir. 1993). A factual dispute is "material" only if it "might affect the outcome of the suit under the governing law." *Anderson*, 477 U.S. at 248. A "genuine" factual dispute requires more than a mere scintilla of evidence. *Id.* at 252.

The moving party bears the initial burden of showing that there is an absence of any genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Hicks v. City of Watonga*, 942 F.2d 737, 743 (10th Cir. 1991). Once the moving party meets its burden, the burden shifts to the nonmoving party to demonstrate that genuine issues remain for trial "as to those dispositive matters for which it carries the burden of proof." *Applied Genetics Int'l, Inc. v. First Affiliated Securities, Inc.*, 912 F.2d 1238, 1241 (10th Cir. 1990); *see also Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986); *Bacchus Indus., Inc. v. Arvin Indus., Inc.*, 939 F.2d 887, 891 (10th Cir. 1991). The nonmoving party may not rest on its pleadings but must set forth specific facts. *Applied Genetics*, 912 F.2d at 1241.

"[W]e must view the record in the light most favorable to the parties opposing the motion for summary judgment." *Deepwater Invs., Ltd. v. Jackson Hole Ski Corp.*, 938 F.2d 1105, 1110 (10th Cir. 1991). Summary judgment may be granted if the non-moving party's evidence is merely colorable or is not significantly probative. *Anderson*, 477 U.S. at 250-51. "In a response to a motion for summary judgment, a party cannot rely on ignorance of facts, on speculation, or on suspicion, and may not escape summary judgment in the mere hope that something will turn up at trial." *Conaway v. Smith*, 853 F.2d 789, 793 (10th Cir. 1988). Essentially, the inquiry is "whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson* at 251-52. Ever mindful of these summary judgment standards, the Court now turns to the merits of defendant's motion.

Introduction

Before we begin our factual discussion and analysis, we trace the various claims that plaintiff has advanced throughout the history of this dispute. We briefly summarize the chronology to determine what claims remain at this stage.

A. EEOC Complaint

Plaintiff filed his complaint with the Equal Employment Opportunity Commission ("EEOC") on April 21, 1997. In that complaint, plaintiff checked the categories labeled "national origin," "age" and "retaliation." Plaintiff did not check the categories labeled "race" or "color." Plaintiff's written statement charged that age was the motivating factor in Raytheon's systematic demotion and/or elimination of older workers, and that Raytheon treated him unfairly and terminated him because of age and in retaliation for complaints about discrimination.[1] The written statement in support of the charge contained no reference to plaintiff's national origin. On September 5, 1997, plaintiff received the EEOC determination and Notice of Right to Sue pursuant to the ADEA.

B. Complaint

On December 3, 1997, plaintiff filed suit. His complaint charged Raytheon with unlawful age discrimination in violation of the ADEA, and unlawful discrimination on the basis of color, race, and national origin in violation of Title VII and Section 1981. The complaint also charged Raytheon with unlawful retaliation in violation of the ADEA, Title VII, and Section 1981, and breach of an implied contract of employment.

C. Pretrial Order

In the pretrial order plaintiff claimed that Raytheon discriminated and retaliated against him in violation of Section 1981 and Title VII (but not the ADEA). *Pretrial Order* (Doc. #58) filed April 21, 1998. In support of his discrimination claims, plaintiff described his national origin as Pakistani but he did not claim to be a member of any group which was protected on the basis of race, color, or ethnicity. In support of his retaliation claims, plaintiff asserted that Raytheon fired him in response to his complaints of unlawful discrimination. Plaintiff also reiterated his claim for breach of implied contract, which he modified to include breach of express contract. Plaintiff sought damages under Title VII, Section 1981, the ADEA, and for breach of contract.

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[1] On November 27, 1996, plaintiff sent a memorandum to Raytheon's director of Staffing and Employee Relations, in which he complained that supervisors gave him poor evaluations because of his age and national origin. Plaintiff's EEOC complaint did not describe any specific acts of discrimination which he had opposed.

D. Plaintiff's Opposition To Defendant's Motion For Partial Dismissal and Opposition To Defendant's Motion For Summary Judgment

In his opposition to Raytheon's motion for partial dismissal, plaintiff conceded his claim for national origin discrimination under Section 1981, as well as his claim for discrimination under the ADEA. *Plaintiff's Opposition To Defendant's Motion For Partial Dismissal* (Doc. #32) filed January 30, 1998. In *Plaintiff's Opposition To Defendant's Motion For Summary Judgment* (Doc. #71) filed June 1, 1998, plaintiff abandoned all of his discrimination claims, stating that "[a]t this stage, plaintiff is conceding that he was ***not*** the victim of unlawful discrimination, and is instead focusing on the ***retaliation*** that he suffered . . . ." (emphasis in original). Plaintiff did not concede his claims for retaliation.

E. Conclusion

Because plaintiff has abandoned his claim for discrimination on the basis of national origin under Section 1981, and because the pretrial order contains no allegation of discrimination on the basis of color, race, or ethnicity under Section 1981,[2] we sustain Raytheon's motion to dismiss plaintiff's Section 1981 claim in its entirety.[3]

Plaintiff has also abandoned his claim for age discrimination under the ADEA. Accordingly, we sustain defendant's motion to dismiss plaintiff's ADEA discrimination claim.

Plaintiff's sole remaining claims are that Raytheon retaliated against him for engaging in protected opposition to unlawful activity, in violation of Title VII and the ADEA, and breached his contract of employment.

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[2] To prove racial discrimination within the meaning of Section 1981, plaintiff must prove discrimination on the basis of ancestry or ethnic characteristics, and not solely on the place or nation of his origin. *See Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 613 (1987) (plaintiff must prove he was subjected to discrimination based on fact that he was born an Arab, "rather than solely on the place or nation of his origin, or his religion"); *Rawlins-Roa v. United Way of Wyandotte County, Inc.*, 977 F. Supp. 1101, 1106-7 (D. Kan. 1997) (plaintiff cannot proceed on separate claims for race and national origin discrimination under Section 1981). *See also, Aramburu v. Boeing Co.*, 112 F.3d 1398, n.2 (10th Cir. 1997) (discrimination claim based on Mexican-American ancestry fell within Section 1981's protection against racial discrimination; "Section 1981 does not protect individuals from discrimination based on national origin"); *Daemi v. Church's Fried Chicken, Inc.*, 931 F.2d 1379, 1386-87 (10th Cir. 1991) (under broad concept of race under Section 1981, plaintiff of Iranian descent protected by Section 1981's bar against race discrimination).

[3] Because plaintiff's claims for retaliation relate to opposition to discrimination on the basis of age and national origin, and not race, color, or ethnicity, plaintiff does not state a claim for retaliation under Section 1981.

Factual Background

The following facts are uncontroverted, or where controverted, viewed in the light most favorable to plaintiff.

Plaintiff, who is Caucasian, is of Pakistani national origin. He was born on May 10, 1947, and his current age is 51. On November 1, 1993, plaintiff applied for employment with Raytheon Aircraft Company ("Raytheon"). He later received an interview with Richard Gaines. Plaintiff's approximate age and Pakistani national origin were obvious from the information he submitted, and nothing discriminatory occurred during the course of the interview. Gaines recommended that plaintiff be hired and on February 23, 1994, Raytheon offered plaintiff a position as a Senior Engineer at an annual salary of $48,000. This offer was $12,300 below the mid-point for Grade 9 engineers, but plaintiff's previous employer had paid him an annual salary of $47,500. Plaintiff's employment application had described his salary expectations as "negotiable" and he made no complaint about the proposed salary; in fact, Raytheon's offer was higher than any salary plaintiff had previously earned and he quickly accepted it without any attempt to negotiate a higher salary.[4] On March 9, 1994, plaintiff began work as a Grade 9 Senior Engineer.

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[4] Nonetheless, plaintiff now contends that because of his age and national origin, his initial salary was not commensurate with his qualifications and education.

Appendix C

Quite a few engineers who were significantly older than plaintiff received higher salaries than plaintiff did. Since plaintiff started work, Raytheon has hired 26 engineers (Grade 9 Senior Engineer positions) who are plaintiff's age or older. Raytheon has also hired at least 11 foreign-born Grade 9 Senior Engineers who earned more than plaintiff. One of those engineers, Mohammad Safir Ulhaque, is also of Pakistani national origin. Like plaintiff, Ulhaque worked on the Hawker program. Ulhaque received good reviews, received a promotion within a year and a half of joining the company, and received good merit increases. Plaintiff and those foreign-born engineers received salaries that were higher than those of at least 11 native-born employees who worked in the same position.

Plaintiff initially worked on the King Air, an aircraft that Raytheon had manufactured since 1964. Plaintiff reported to Gaines, whom plaintiff believed to be "a very nice person." Gaines was a Designated Engineering Representative ("DER"), which authorized him to certify that engineering work was in compliance with and acceptable to the Federal Aviation Administration ("FAA"), the federal agency which oversees the design and manufacture of aircraft.

In 1994, plaintiff received a Christmas card from Gaines and his wife. The card offended plaintiff because he does not celebrate Christmas, but he never complained and he does not know whether Gaines sent similar cards to all of his co-workers. Plaintiff does not believe that Gaines or any other supervisors discriminated against him while he worked in the King Air program.

Appendix C

Generally, salaried employees at Raytheon receive annual evaluations. In October of 1994, Gaines evaluated plaintiff's performance using the standard Salaried Performance Review form. The form included categories for quality of work, quantity/timeliness of work, job knowledge, initiative, attitude/effective relationships, and leadership effectiveness. Each category was susceptible of one of six ratings, ranging from "outstanding" to "unsatisfactory." Another category, safety and security, could be rated as either "acceptable" or "unacceptable." The form also included an overall performance rating and a section for comments.

In October of 1994, Gaines evaluated plaintiff as "fully competent" on all categories except attitude/effective relationships, which he graded as "above average." Plaintiff's overall performance rating was "fully competent."[5] Plaintiff made no complaint regarding the evaluation, either to his supervisors or later, in his EEOC complaint.

Early in his work for Gaines, plaintiff selected a non-standard part for one of his projects. Gaines told him to use a more common part in order to minimize costs, but plaintiff resubmitted the drawing with the same part. Gaines again marked up plaintiff's drawing, told him to use a commonly-used part, and even suggested what particular part would be appropriate. Gaines moved to another group before plaintiff's drawing was released, but he later learned that plaintiff had not made the changes and that someone else had to revise and correct plaintiff's work. Gaines did not report the error in plaintiff's evaluation. Gaines later admitted that plaintiff's error was only a minor detail, but also noted that plaintiff refused to acknowledge that he had been wrong.

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[5] Plaintiff now contends that the review was discriminatory, in that everyone knows he is one of the best engineers in the aircraft industry. Plaintiff believes that he should have been rated as "above average" or "excellent" on quality of work, at least "excellent" on quantity of work and job knowledge, and "excellent" or "outstanding" on overall performance.

By the time of his 1995 performance review, plaintiff was reporting to Bob Pedroja, a different supervisor on the King Air program. That performance review indicated that plaintiff was "fully competent" in quality of work, quantity/timeliness of work, job knowledge, attitude/effective relationships, and leadership effectiveness, and "above average" on initiative. Plaintiff's overall performance rating was "fully competent." When plaintiff received the performance review, he told Nita Long, the director of staffing and employee relations, that he should have been rated higher. Pedroja subsequently agreed to improve the rating for attitude/effective relationships to "above average." He refused to change the other ratings.[6]

In early 1995, Raytheon began preliminary design work for what eventually became the Hawker aircraft program. Initially, Sam Bruner was the only employee who worked on the program. Other employees later joined the program and by the end of 1995, the program had 20 to 25 employees. In October of 1995, plaintiff's name appeared on a list of engineers who were going to be "offloaded" from the King Air program. Eddy Arnold, who reported directly to Bruner, was managing the air vehicle design group, which was responsible for designing the physical hardware on the aircraft.[7] Arnold reviewed the list of employees who were going to be "offloaded" and chose four persons, including plaintiff, to interview for his group. Arnold selected plaintiff because of his paper qualifications and because Gaines had told Arnold that plaintiff was capable and worked hard. The interview was successful and plaintiff transferred to the Hawker program on November 1, 1995.

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[6] Plaintiff's EEOC complaint did not include any allegation that the 1995 review reflected discrimination. Plaintiff now contends that he did not receive higher ratings because of discrimination.

In the summer of 1996, plaintiff was required to perform certain calculations concerning the ice protection system for the Hawker aircraft. Plaintiff presented his calculations to a group of design engineers. Derek Rounds, a specialist in ice protection systems, checked plaintiff's calculations and found errors. Rounds had come from England, along with the Hawker aircraft, when Raytheon purchased it. Despite Rounds' experience and expertise with the program, plaintiff denied that he had made any errors and ignored Rounds' comments about his calculations. Gaines also checked plaintiff's work, however, and likewise found errors. Plaintiff's errors resulted from mathematical errors and incorrect assumptions which resulted from the fact that plaintiff had premised his calculations on information which was not related to the Hawker aircraft. The information which plaintiff needed to formulate accurate assumptions was readily available, however, and if Raytheon had used plaintiff's calculations, it could have chosen the wrong engine for the aircraft.[8]

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[7] Arnold, who was born on March 31, 1938, is nine years older than plaintiff.

[8] Plaintiff denies that any calculation errors were serious. He notes that Gaines has stated that no one can check his own work

(Cont'd)

In mid-1996, more people joined the Hawker program. In June of 1996, Gaines transferred to the program and became group engineer for the environmental systems and ice protection group, where plaintiff again worked for him. Arnold, however, prepared plaintiff's annual performance review for September 1996. The review noted that plaintiff needed to learn to handle constructive criticism in a manner that could lead to improved performance. In Arnold's judgment, plaintiff became defensive and stubborn if anyone criticized his work. Before putting the review in final form, Arnold discussed it with Bruner, his own supervisor. Bruner suggested adding a comment that plaintiff needed to exercise more care in reducing errors in analysis calculations. Arnold incorporated Bruner's suggestions and gave plaintiff the performance review on September 4, 1996. The review rated plaintiff as "fully competent" in quality of work, quantity/timeliness of work, job knowledge, initiative, attitude/effective relationships, and leadership effectiveness, and "fully competent" overall. In the employee comment section, plaintiff responded that the "[a]ssigned ratings (not including ratings for 'safety and security' and 'business and ethics and conduct') are *not* commensurate with my performance" and that the ratings should have been in the " 'outstanding' to 'excellent' range."

On September 21, 1996, plaintiff complained to Long that he was dissatisfied with his annual review.[9] Four days

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and be 100 percent correct. Plaintiff also notes that Arnold thought he did a good job on that specification and that according to Arnold, it would be unusual for an engineer not to make mathematical errors.

[9] Plaintiff did not allege any discrimination.

later, on September 25, 1996, Gaines told Arnold that plaintiff was extremely difficult to deal with due to his "arrogant incompetence." At that time, Gaines had not yet assumed his role of plaintiff's supervisor, and Arnold did not document the comments in plaintiff's performance review for that year.

Art Kavie transferred to the Hawker program and became manager of the design build team in October of 1996. With this transfer, Gaines reported to Kavie and plaintiff reported to both Gaines and Kavie. When plaintiff learned that Kavie had named Gaines as lead supervisor, plaintiff complained to Kavie in a boisterous tone that Kavie could have told him earlier.

Before Kavie moved to the Hawker program, he attended a meeting where plaintiff presented certain calculations. When Kavie disagreed with plaintiff's approach and suggested the proper one, plaintiff raised his voice and appeared to Kavie to be offended.[10] In another meeting, in October of 1996, Kavie indicated his preferences regarding preparation of design drawings. Kavie claims that he had to cut plaintiff off, telling plaintiff to discuss it with Gaines later.

On October 16, 1996, plaintiff sent a memorandum to Malcolm Bowd and other managers, describing how a portion of the anti-icing system should be configured. Plaintiff did not send a copy of the memorandum to Gaines, his immediate supervisor, or to Kavie, his next-level supervisor.[11] According to Gaines, while other employees would presume that the memorandum contained the group's recommendations,[12] the recommendations in the memorandum were actually contrary to instructions which Gaines had given plaintiff.

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[10] Plaintiff purports to dispute Raytheon's version of these facts without citing any record evidence. Because plaintiff has failed to comply with D. Kan. Rule 56.1, which requires him to refer with particularity to those portions of the record upon which he relies, we deem defendant's facts to be admitted.

Also in October of 1996, plaintiff had to prepare a Pressurization Control System Specification for Raytheon to send to prospective suppliers to solicit contract proposals. Plaintiff drafted the specification in such a way that only one supplier could provide the equipment. Gaines therefore instructed plaintiff to remove certain system requirements from the draft specification. Plaintiff refused to draft the specification as directed and suggested that Gaines take plaintiff's name off the specification if he insisted on the changes. Gaines had to correct and rewrite the specification himself. When Gaines notified plaintiff of the errors, plaintiff refused to change the specification.[13] Plaintiff denies that his specification contained *serious* errors and describes Gaines' changes as "pedantic" and mere "nomenclature." According to Gaines, the technical errors were numerous and serious.

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[11] Plaintiff asserts that he did not send a copy to Gaines because he had previously discussed it with Gaines on several occasions and had given Gaines a detailed memorandum which Gaines threw in the trash. Plaintiff has again failed to comply with D. Kan. Rule 56.1, however, by citing deposition testimony which is not in the record. Accordingly, we accept as true Raytheon's statement of such facts.

[12] According to Gaines, Bowd interpreted the memorandum as a recommendation from the entire group and had serious misgivings about the features identified therein. This evidence appears to be inadmissible hearsay, however, and we do not consider it.

[13] Plaintiff denies that he refused to comply with Gaines' request, citing his memorandum of November 27, 1996, to Gaines, (Cont'd)

On October 24, 1996, plaintiff sent other group members a draft memorandum on Air Conditioning Specifications without first discussing the memorandum with Gaines. At this time Gaines had not asked plaintiff to route specifications through him, but plaintiff's specifications were incompatible with the aircraft design.

Long met with plaintiff on October 23, 1996. During that meeting, plaintiff did not complain of discrimination but he again told Long that he was dissatisfied with the performance review which he had received in September. Long offered to set up a meeting with plaintiff and his supervisors. As she was in the process of doing so, plaintiff's supervisors informed her that they wanted to meet with her to discuss plaintiff's performance problems.

On November 15, 1996 plaintiff attended two separate meetings. Plaintiff first met with Long (director of staffing and employee relations), Arnold (manager of the air vehicle design group), and Bruner (Arnold's supervisor). During that meeting, plaintiff spent approximately one hour discussing his performance evaluation, hoping to persuade his supervisors to change it. Plaintiff complained that the

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Long, Bruner and Kavie. *See infra*. That document does not support plaintiff's assertion, however, and we therefore deem Raytheon's version of this fact to be admitted. *See* D. Kan. Rule 56.1.

evaluation was not commensurate with his qualifications and performance, and that it was based on discrimination. Arnold explained why he had given plaintiff the marks in each category and explained how plaintiff could improve. According to Arnold, plaintiff did not appear to want to hear what he had to say,[14] and the performance evaluation was not changed.

Immediately after the first meeting on November 15, plaintiff attended a second meeting at which Long, Bruner, Gaines and Kavie gave him a special performance review. Long and Bruner had attended the earlier meeting, when plaintiff first made verbal complaints of discrimination. The review rated plaintiff "unsatisfactory" in quality of work, quantity/timeliness of work, attitude/effective relationships and leadership effectiveness, rated him "unsatisfactory" overall, and said that he needed development in displaying initiative. Plaintiff's supervisors gave him a written memorandum which discussed these items, and asked for his response. Plaintiff responded that the special review was unjustified; that it was based on age and national origin discrimination; and that it was in retaliation for comments he had written in the employee comment section of the September review and in retaliation for his earlier complaints of discrimination to Arnold and Long.[15] Plaintiff also indicated that he would respond later, in writing.

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[14] Plaintiff denies Arnold's characterization of his demeanor, but he has not cited relevant portions of the record in support of this claim. Accordingly we deem Raytheon's version of this fact to be admitted. *See* D. Kan. Rule 56.1. Because the record reveals a recurring problem in plaintiff's presentation of the evidence, the balance of the factual statement will not document specific instances of non-compliance but will merely deem Raytheon's version of the relevant fact to be admitted where supported by record evidence.

Plaintiff's supervisors had initially planned to reconvene the discussion with plaintiff in two weeks, based on their assumption that plaintiff would respond to their concerns during the meeting on November 15. The subsequent meeting did not occur, however, because plaintiff declined to respond during the November 15 meeting.

After the meetings on November 15, plaintiff acted resentfully when Gaines tried to give him instructions and Gaines believed that plaintiff disagreed with his supervision. Kavie observed that plaintiff would not speak when he greeted plaintiff in the hallway. While Kavie never raised the issue with plaintiff, no one during his ten years of employment with Raytheon ever treated him so rudely. For his part, plaintiff believes that beginning on November 15, his managers gave him hostile treatment and excluded him from meetings he should have attended.

On November 27, 1996, plaintiff submitted a written response to the comments he had received at the special review on November 15. Plaintiff's response — which he sent directly to Gaines, with copies to Long, Bruner, and Kavie — did not claim that Raytheon had subjected plaintiff to discrimination. It stated that plaintiff strongly disagreed with the stated reasons for the special review and discussed each of the shortcomings his supervisors had identified, dismissing them as either exaggerated or false. Plaintiff's memorandum also stated that he would work to clear up misconceptions about his work, despite his belief that he was already "in total compliance." Plaintiff's supervisors were disappointed with the attitude reflected in the memorandum, which they perceived as "I'm right, you're wrong."

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[15] Plaintiff's notes of the meeting make no mention of any such complaints.

When plaintiff copied his November 27 memorandum to Long, he included an attachment, addressed only to her, which stated as follows:

> Dear Ms Long
>
> As you know, I believe that my Performance Review was inaccurate.
>
> I believe that the Special Review was done in retaliation for my having met with you and raised complaints. When I met with you about my performance review in October, I did not raise any allegations about discrimination based on my age or national origin because I did not want to belive [sic] that either of those factors might have motivated my management to treat me unfairly. Now after having had my technical competence and performance questioned by Mr. Gaines, I certainly believe that there is something more that is motivating him to treat me in this adverse manner. It appears to me that there has been an effort to eliminate older workers (of which I am one) from lead positions and to weed older

> workers out. I do not have any proof. I would like to have your office investigate the recent changes to my situation and to others in my department.
>
> Mohammad M. Shinwari

This memorandum was Raytheon's first written notice that plaintiff alleged any sort of discriminatory treatment.[16] Long never showed this document to plaintiff's supervisors, and did she not discuss it with them.[17] Indeed, she did not inform anyone within the company about plaintiff's suggestion that he was being discriminated against. Furthermore, Long did not investigate the charges because she had already reviewed examples of plaintiff's poor work and had heard his supervisors describe his deficient work, attitude and behavior. Long also thought that the charges were suspicious because plaintiff had raised them only after he was in trouble for poor performance and behavior.

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[16] Plaintiff made such charges verbally, at the meeting with Long and his supervisors on November 15, 1997. Plaintiff "thinks" that he complained of age or national origin discrimination in the meeting with Long which occurred right after his performance review in September of 1996, *Deposition of Mohammad M. Shinwari* (Vol. I) at 683-84 (January 26, 1998), but does not recall whether he did so and his memo to Long on November 27, 1997, admits that he did not raise any allegations about discrimination at that time because he did not want to think that age or national origin discrimination might have motivated management to mistreat him.

[17] Plaintiff denies Raytheon's evidence that Long never showed the document to plaintiff's supervisors. The evidence which plaintiff cites in support of his contention relates to an e-mail message which he sent to Long on January 13, 1997. Bruner testified that the e-mail was "the sort of thing that would probably generate some response among recipients." Such evidence does not establish a dispute whether Long showed the November 27, 1996 document to plaintiff's supervisors. For this reason, and because plaintiff lacks personal knowledge of Long's actions, we deem Raytheon's version of this fact admitted.

On December 4, 1996, plaintiff completed two projects which Gaines had assigned him on November 21, 1996. Gaines had put the assignments in writing because plaintiff had previously been unresponsive to verbal instructions. According to Gaines, the work was handwritten, nearly illegible, filled with interlineations and words that had been scribbled out, and appeared to have been hurriedly done; it would have to be entirely redone before it would be acceptable. Gaines forwarded the work to Kavie, who had wanted to assess plaintiff's capabilities. Kavie decided to redo the project himself. Kavie and Gaines could not identify other assignments that they thought plaintiff would perform satisfactorily.[18]

In December of 1996 Raytheon provided merit increases. Plaintiff received an increase of 1.95%, or $1,000. Plaintiff alleges that his merit increase was small in retaliation for his complaints of discrimination. Plaintiff had talked about his salary with Arnold when he initially transferred to Arnold's group. Although the subject of age did not arise during the conversation, Arnold asked plaintiff why he thought he was making so little money, given his educational background, experience and performance. Plaintiff believes Arnold was implying that plaintiff's salary might be related to his age.

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[18] Plaintiff notes that the project was a new concept and that his supervisors did not ask him to redo the work or give him any feedback.

On January 13, 1997, plaintiff sent Long an e-mail, noting that the special performance review of November 15 had contemplated a follow-up special review within two weeks. He complained that he had received a low merit increase, that supervisors refused to give him work, that he was excluded from meetings and decisions, and that management was trying to "trap" him to do things that would jeopardize his career. Plaintiff concluded that "[i]n the light of the above I strongly believe that I am, on a regular basis, discriminated against, because of my age and other background." Long did not share this document with plaintiff's supervisors until after plaintiff's employment had been terminated.[19]

In mid-January of 1997, plaintiff's supervisors informed Long that there were continuing performance and attitude problems with plaintiff, and Kavie recommended that he be transferred. On January 15, Long contacted the Engineering

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[19] Plaintiff seeks to establish a dispute whether Long provided the document to others before his termination by citing Bruner's testimony that, "[w]asn't there a letter that we got in [January] stating that he was being discriminated against on the basis of his age and I think it was national origin?" and "we received a letter in the January time frame that we all read and commented on . . ." Subsequently, however, Bruner submitted deposition corrections which retracted his deposition testimony. Bruner's corrected testimony indicates that he and other supervisors did not see the January 13, 1997, e-mail before plaintiff's termination.

Administration office and asked Jim Miller to try to find plaintiff another engineering position. Miller reported back that he could not to do so because plaintiff's prior supervisors did not want him back and other supervisors were unwilling to accept him because of his reputation for being argumentative, opinionated and unwilling to listen to the opinions of others.

As of January 17, 1997, no alternative position was available for plaintiff, and Kavie decided to terminate his employment. Kavie and Gaines prepared a special review of plaintiff's work performance, giving him an overall rating of "unsatisfactory." Comments on the special review noted the poor quality of plaintiff's work, his unwillingness to accept direction, and his unwillingness to acknowledge or correct the serious attitude problem that had been noted in the earlier special review. Raytheon presented this special review to plaintiff on January 24, 1997 and told him that he could either resign or receive involuntary termination. Plaintiff chose the latter, and Raytheon terminated his employment effective January 24, 1997, for the stated reason of deteriorating performance.

Plaintiff has admitted that he did not recall that anyone at Raytheon ever told him that he could only be terminated for good or just cause, and he believed throughout his employment that he was free to leave at any time.

Analysis

I. Unlawful Retaliation In Violation Of Title VII And The ADEA

As noted above, plaintiff claims that Raytheon retaliated against him for engaging in protected opposition to unlawful activity, in violation of Title VII and the ADEA. Specifically, plaintiff alleges that at the meeting on November 15, 1996, he raised the issue of unlawful discrimination with Long, Arnold and Bruner, stating that his performance evaluation "might reflect some bias on the part of management against older workers." *Pretrial Order* at 4. Plaintiff alleges that he raised the same concerns in a memorandum to Long dated November 27, 1996, in which he asked her to investigate his allegations of discrimination based on age and national origin. *Id.* Plaintiff alleges that after these communications, while he made "every reasonable attempt to keep his management informed of his work performance and progress on assigned projects," management had an extremely hostile attitude toward him. *Id.* Plaintiff asserts that later, in January of 1997, he informed Long of his belief that Raytheon was discriminating against him on the basis of age and national origin. *Id.* Plaintiff contends that in response, Raytheon further retaliated against him by preparing a special performance review to document ongoing performance problems and justify his termination on January 24, 1997.

Raytheon argues that it is entitled to summary judgment on plaintiff's retaliation claims because plaintiff had no reasonable belief that Raytheon had discriminated against him or other employees on the basis of either age or national origin; (2) plaintiff has no evidence of a causal connection between plaintiff's complaints of discrimination and any adverse action toward him; and (3) even if plaintiff has a prima facie case of actionable retaliation, he has no evidence that Raytheon's stated reasons for termination were false. Plaintiff disagrees, claiming that he had a reasonable belief that Raytheon was engaged in unlawful discrimination, that he was "essentially frozen out of his organization" after his first complaint of discrimination on November 15, 1996, and that the mere sequence of events raises an inference of retaliation. The crux of plaintiff's complaint is that Raytheon treated him differently after he made written complaints of discrimination to Long on November 27, 1996, and January 13, 1997, alleging that supervisors had given him poor evaluations because of his age and/or national origin.

In analyzing plaintiff's retaliation claims, we apply the shifting burden of proof scheme initially articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Under this standard, if plaintiff establishes a prima facie case of retaliation, the burden shifts to Raytheon to offer a legitimate reason for the adverse action. Once Raytheon offers such a reason, the burden shifts back to plaintiff to show that there is a genuine dispute of material fact as to whether Raytheon's proffered reason for the challenged action is pretextual. *Conner v. Schnuck Markets, Inc.*, 121 F.3d 1390, 1394 (10th Cir. 1997).

Title VII and the ADEA prohibit an employer from discriminating against an employee because the employee "has opposed any practice made an unlawful employment practice" by Title VII or the ADEA. 29 U.S.C. § 623(d);

42 U.S.C. § 2000e-3(a). To establish a prima facie case of retaliation under Title VII or the ADEA, plaintiff must show (1) that he engaged in protected opposition to Title VII or ADEA discrimination; (2) that he was disadvantaged by an action of his employer subsequent to or contemporaneously with such opposition; and (3) that a causal connection exists between the protected activity and the adverse employment action.[20] *Williams v. Rice*, 983 F.2d 177, 181 (10th Cir. 1993); *Dunbar v. Board of Directors of Leavenworth Public Library*, 996 F. Supp. 1086, 1092 (D. Kan. 1998); *Amro v. Boeing Co.*, 951 F. Supp. 1533, 1555 (D. Kan. 1997).

A. ADEA Retaliation Claim Based On Complaints Of Age Discrimination

As noted above, Raytheon argues that it is entitled to summary judgment on plaintiff's ADEA retaliation claim because (1) plaintiff had no reasonable belief that Raytheon was engaged in age discrimination; (2) plaintiff has no evidence of a causal connection between plaintiff's complaints of discrimination and any adverse action toward him; and (3) even if plaintiff had a prima facie case of actionable retaliation, he has no evidence that the stated reasons for termination were false. In its motion to dismiss, Raytheon also argues that plaintiff cannot recover punitive damages and compensatory damages under the ADEA.

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[20] We apply the same general standards of proof to ADEA retaliation claims as we do to Title VII retaliation claims. *See Anderson v. Phillips Petroleum Co.*, 861 F.2d 631, 634 (10th Cir. 1988).

1. Protected Opposition

Plaintiff claims that he had a reasonable belief that he and other employees were subjected to age discrimination because he saw three older workers (Ted Seely, Charles Davidson and Steve Ugezene) who were passed over for lead positions or relieved of existing responsibilities; because Arnold did not allow older engineers to do presentations because he wanted to give opportunities to younger engineers; and because Raytheon brought in Gaines as plaintiff's lead even though plaintiff was already in position and was performing at a "fully competent" level. *Plaintiff's Opposition To Defendant's Motion For Summary Judgment* (Doc. #71) filed June 1, 1998, at 38.

In order to establish that he engaged in protected opposition to discrimination, it is not necessary for plaintiff to prove actionable discrimination. *Love v. Re/Max of America, Inc.*, 738 F.2d 383, 384 (10th Cir. 1984). To constitute protected activity, his opposition must have derived from a good faith, reasonable belief that Raytheon subjected him or other employees to discrimination. *Id.* at 385 (opposition protected when based on mistaken good faith belief that Title VII has been violated); *Plakio v. Congregational Home, Inc.*, 902 F. Supp. 1383, 1392-93 (D. Kan. 1995); *Sias v. City Demonstration Agency*, 588 F.2d 692, 695 (9th Cir. 1978) (when plaintiff reasonably believes discrimination exists, opposition is protected even if plaintiff turns out to be mistaken as to facts).[21]

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[21] *See also Moyo v. Gomez*, 32 F.3d 1382, 1385 (9th Cir. 1994) (erroneous belief that employer engaged in unlawful

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Courts have held that plaintiff's burden under this standard has both subjective and objective components: plaintiff must show not only that he subjectively believed in good faith that Raytheon engaged in unlawful discrimination, but also that his belief was objectively reasonable in light of the facts and record presented. *E.g.*, *Little v. United Technologies, Carrier Transicold Div.*, 103 F.3d 956, 960 (11th Cir. 1997) (plaintiff must do more than allege honest and bona fide belief; allegations and record must also indicate that belief, though perhaps mistaken, was objectively reasonable); *Harper v. Blockbuster Entertainment Corp.*, 139 F.3d 1385, 1388 (11th Cir. 1998) (male employees could not have objectively reasonable belief that hair grooming policy constituted unlawful discrimination on basis of sex, given unanimity with which courts had declared such policies non-discriminatory); *Galdieri-Ambrosini v. National Realty & Development Corp.*, 136 F.3d 276, 292 (2d Cir. 1998) (courts assess reasonableness of plaintiff's belief in light of totality of circumstances).

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employment practice is reasonable and thus actionable under Title VII, if premised on mistake made in good faith, which may be one of fact or of law). In *Moyo*, the Ninth Circuit held that the reasonableness of plaintiff's belief that an unlawful employment practice occurred must be assessed according to an objective standard, "one that makes due allowance, moreover, for the limited knowledge possessed by most Title VII plaintiffs about the factual and legal bases of their claims." 32 F.3d at 1385-86. The *Moyo* court further noted that courts construe Title VII broadly, and that that approach is applicable to the determination whether plaintiff reasonably believed that a violation had occurred. *Id.* at 1386.

Plaintiff's professed belief that Raytheon was engaged in unlawful activity arose from the following circumstances: (1) plaintiff's belief that his 1996 performance evaluation reflected bias toward older employees; (2) Arnold's comment about plaintiff's salary; (3) the fact that "there was one time" when Arnold did not let plaintiff, Seely or Davidson participate in a presentation to "very upper management;" (4) plaintiff's belief that Seely, Davidson, Ugezene and other unidentified over-40 engineers had been demoted or relieved of leadership responsibilities; (5) the fact that Raytheon selected Gaines, rather than plaintiff, as lead engineer on the environmental control system team; and (6) a conversation where Seely told plaintiff that he was not happy with his performance evaluation.

Even if plaintiff concluded from these facts that Raytheon had engaged in age discrimination, the record reveals no genuine issue of triable fact as to the objective reasonableness and good faith of plaintiff's professed belief. At most, the record reveals that plaintiff *suspected* illegal activity or, viewed from a less charitable but perhaps more accurate standpoint, that to fortify his personal position relative to Raytheon and avert his impending dismissal, plaintiff *hoped* that Raytheon had engaged in illegal activity. Plaintiff was substantially mistaken as to the factual circumstances constituting the alleged acts of discrimination, however, and this record permits no reasonable inference that his factual mistakes were either made in good faith or resulted from any objectively reasonable misunderstanding of the relevant circumstances. Even making due allowance for the fact that plaintiff may have possessed limited knowledge about the factual and legal basis for his accusations, the Court finds as a matter of law that plaintiff could not reasonably believe that the foregoing circumstances constituted unlawful activity by Raytheon.[22]

First, the record is devoid of evidence that plaintiff's performance evaluation in September of 1996 reflected bias toward older employees. Plaintiff does not recall whether he alleged age discrimination on September 21, 1996, when he complained to Long about his annual review. He did not allege age discrimination when he complained to Long on October 23, 1996. His notes of the meeting on November 15, 1996, do not support his assertion that he raised the discrimination issue during the meeting. His note to Long on November 27, 1996, admitted that he had no proof of discrimination and admitted that he did not raise any allegations about discrimination during the earlier meeting. Arnold, who as supervisor completed the performance review, was nine years older than plaintiff. The record contains no evidence that similarly-situated younger employees received higher evaluations when they performed comparable work. Indeed, plaintiff has abandoned all claims of discrimination in this case — a fact which tends to suggest that even today he lacks an objectively reasonable belief that

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[22] In this case, plaintiff is not entitled to any *substantial* margin for error based on a hypothesis that he had limited knowledge about the factual and legal basis for his charges of discrimination. Plaintiff consulted with an attorney before making any of his accusations, and his charges of discrimination did not present any difficult legal concepts or require a sophisticated understanding of Title VII. Plaintiff is well educated and the record contains no basis from which a reasonable jury would conclude that his accusations involved fine legal points that were somehow beyond his ken.

Raytheon engaged in age discrimination against him. *See Boyd v. Runyon*, 1996 WL 294330, 3 Wage & Hour Cas.2d (BNA) 591 (D. Kan. 1996) (plaintiff's opposition to employer's activity could not be viewed as reasonable, though mistaken, allegation of violation of Title VII, because plaintiff did not allege discrimination based on sex or other protected category). Based on the evidence of record, a reasonable jury would not believe that plaintiff's performance evaluation in September of 1996 reflected bias toward older employees, or that plaintiff had a good faith, objectively reasonable belief that it did.

The same is true with respect to plaintiff's reliance on Arnold's stray question why plaintiff thought he was making so little money, given his educational background, experience and performance. While plaintiff believes that Arnold was implying that plaintiff's salary might be related to his age, the law is clear that actionable claims of discrimination cannot be premised upon stray comments. In order to rely upon age related statements, plaintiff must show that they were made by a decision-maker and that there was a nexus between the discriminatory statements and adverse action by the employer. *McKnight v. Kimberly Clark Corp.*, __ F.3d __, 1998 WL 384608 (10th Cir. 1998); *Cone v. Longmont United Hospital Ass'n*, 14 F.3d 526, 531 (10th Cir. 1994). In this case, neither requirement is met. Based on the evidence of record, including the fact that Arnold is nine years plaintiff's senior, a reasonable jury would not believe that Arnold's question about plaintiff's salary reflected bias toward older employees, or that plaintiff had a good faith, objectively reasonable belief that it did.

Third, plaintiff's belief that he and older employees were not receiving the same opportunities as younger engineers — based on the "one time" when Arnold did not let plaintiff, Seely and Davidson make presentations to "very upper management" — is similarly insufficient to raise a genuine issue of material fact with respect to the bona fides of plaintiff's accusations of illegal conduct by Raytheon. When plaintiff asked Arnold why plaintiff could not make a presentation, Arnold replied that "he was giving an opportunity to the younger leads, and later on, then he will switch." In other words, according to plaintiff, Arnold told plaintiff that "he would give me some chance and Ted Seely some chance and Chuck Davidson some chance to make these type of presentations" but that "that time . . . he is going to give those to the younger leads." *Deposition of Mohammad M. Shinwari* (Vol. I) at 444-45 (January 26, 1998). Arnold allowed Bowd, who is two years older than plaintiff, to present plaintiff's part of the project. The record does not reveal who presented the project information from Seely and Davidson. Furthermore, plaintiff cites no evidence that Arnold's explanation was untrue, in that he did not let older employees have their turn in making presentations to top management. Plaintiff cites no evidence that the presentation was inappropriately presented by younger engineers, that older engineers had insufficient opportunities for other presentations or that they suffered adverse employment consequences because Arnold cut them out of the action on this single occasion. In the circumstances, especially given the fact the Arnold is nine years older than plaintiff, a reasonable jury would not believe that Arnold's decision to let younger engineers take the lead "this one time" reflected bias toward older employees, or that plaintiff had a good faith, objectively reasonable belief that it did.

Fourth, plaintiff's mistaken belief that Seely, Davidson, Ugezene and other unidentified over-40 engineers had been demoted or relieved of leadership responsibilities cannot carry his claim of protected opposition in this case. As an initial matter, plaintiff cites no record support for his alleged belief that over-40 engineers were demoted or relieved of leadership responsibilities. The record contains no evidence that Seely, Davidson, Ugezene or any other over-40 engineers received demotions or significant reductions in leadership responsibilities. In fact it reveals that Seely, Davidson, and Ugezene consistently occupied Grade 9 engineering positions with annual salary increases. At the status conference held July 9, 1998, plaintiff's counsel admitted that Davidson, Seely and plaintiff did not receive demotions, but stated that plaintiff had believed they should have received *promotions* as more people joined the Hawker program. Plaintiff's counsel cited no record evidence that plaintiff in good faith entertained this belief, or that it was objectively reasonable in the circumstances. Plaintiff testified at his deposition that between September 6 and October 23, 1996, Kavie relieved Seely of his responsibilities as lead on the engine and power auxiliary unit and told him that Bill Burgess would take over his position. *Deposition of Mohammad M. Shinwari* (Vol. I) at 264, 525 (January 26, 1998). In fact, however, Kavie himself assumed Seely's position as lead. Kavie is older than Seely and is ten years older than plaintiff. Based on such evidence, no reasonable jury would believe that Raytheon demoted over-40 engineers or relieved them of leadership responsibilities on account of their ages, or that plaintiff had a good faith, objectively reasonable belief that it did.

Fifth, the fact that Raytheon selected Gaines rather than plaintiff as lead engineer on the environmental control system team affords an insufficient predicate for a finding of protected activity in this case. According to plaintiff, shortly after Kavie "demoted" Seely, Kavie told plaintiff that plaintiff would not be lead on the environmental control system and that he had nominated Gaines for that position. *Deposition of Mohammad M. Shinwari* (Vol. I) at 525-26 (January 26, 1998). While Gaines was younger than plaintiff and plaintiff believed that the promotion should have been his, the record compels a contrary conclusion. Gaines was a Designated Engineering Representative for the FAA. Raytheon had found him to be a very methodical, very hard worker who had done "an outstanding job" on his previous assignment. Gaines had the DER credentials to confirm his expertise in the area, and the undisputed fact is that those two things "set him above the rest of the other individuals in the [environmental systems] group," so that he was "the logical choice" for lead engineer. The record does not reflect that plaintiff had comparable credentials or expertise. In the face of such evidence, no reasonable jury would believe that Raytheon refused to promote plaintiff over Gaines on account of his age, or that plaintiff had a good faith, objectively reasonable belief that it did.

Finally, plaintiff's belief that Seely was unhappy with a performance evaluation does not provide a sufficient predicate for a finding of protected activity in this case. The evidence on this point is hearsay, and the record contains no evidence that Seely himself attributed the evaluation to age discrimination. Indeed, while Seely wrote Arnold and Bruner a memo which reflected his disagreement with their evaluation, he did not attribute any part of his disagreement to age discrimination. The record contains no information concerning how Seely's evaluation compared to the evaluations of similarly-situated younger employees, and a reasonable person would not conclude from the naked fact that Seely was in a protected age group that an adverse evaluation must be the result of age discrimination. In summary, no reasonable jury would believe that Raytheon gave Seely a bad evaluation on account of his age, or that plaintiff had a good faith, objectively reasonable belief that it did.

Although opposition activity is protected when based on a mistaken belief that Title VII has been violated, *Love*, 738 F.2d at 385, that belief must be in good faith and reasonable. *Id.* In this case, however, the record is devoid of evidence that plaintiff's view of the facts was reasonable, though wrong. The record tells us nothing about the sources of plaintiff's factual information, the extent of his inquiry or investigation, or why plaintiff misapprehended such basic points as the fact that Seely, Davidson and Ugezene were not demoted, that Seely's responsibilities were assumed by someone older than Seely, that someone older than plaintiff presented his project to top management, and so forth. Nor does the record suggest that plaintiff made a good faith and reasonable mistake in drawing the legal conclusion that Raytheon had violated the ADEA. In order to justify a finding of objective reasonableness, the record must establish facts which suggest that a reasonable person in plaintiff's position would believe that defendant had engaged in illegal activity. The record in this case does not do so. In fact, the only permissible inference which reasonably flows from this record is that plaintiff manufactured a charge of discrimination to deflect attention from his own performance problems.

In summary, assessing the reasonableness and good faith of plaintiff's belief in light of the totality of the circumstances, *Galdieri-Ambrosini*, 136 F.3d at 292, the Court finds as a matter of law that no reasonable jury would conclude that plaintiff had an objectively reasonable belief that Raytheon had engaged in unlawful activity at the time he opposed the alleged discrimination. Accordingly, plaintiff has failed to establish the first element of his prima facie case for retaliation, in violation of the ADEA.[23]

2. Causal Connection

Raytheon does not dispute that plaintiff suffered adverse action. Accordingly, we turn to the remaining element of plaintiff's prima facie case of retaliation, whether a causal connection exists between the protected activity and the adverse employment action.

The Tenth Circuit has held that "[t]he causal connection may be demonstrated by evidence of circumstances that justify an inference of retaliatory motive, such as protected conduct closely followed by adverse action." *Conner*, 121 F.3d at 1395 (citing *Burrus v. United Tel. Co. of Kansas, Inc.*, 683 F.2d 339, 343 (10th Cir.), *cert. denied*, 459 U.S. 1071 (1982)). Under that standard, a four-month time lag between participation in protected activity and termination by itself is not sufficient to justify an inference of causation. *Id.* Nor is a three-month period sufficient. *See Richmond v. ONEOK, Inc.*, 120 F.3d 205, 208 (10th Cir. 1997); *see also Butler v. City Of Prairie Village*, 974 F. Supp. 1386, 1398 (D. Kan. 1997) (temporal proximity of between one and four months insufficient to raise inference of retaliation). A two-hour gap, on the other hand, would be sufficient. *See Love*, 738 F.2d at 386. A two-day gap would also suffice. *See Hansen v. Alta Ski Lifts Co.*, 141 F.3d 1184 (table; text available in Westlaw at 1998 WL 161147, *3) (10th Cir. 1998) (citing *Sauers v. Salt Lake County*, 1 F.3d 1122, 1128 (10th Cir. 1993)).

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[23] We further find that Raytheon has articulated a legitimate reason for the employment action taken and that plaintiff cannot point to evidence that Raytheon's reason was merely pretextual. *See* analysis, pt. B.3, *infra*.

In *Marx v. Schnuck Markets, Inc.*, 76 F.3d 324, 329 (10th Cir.), *cert. denied*, 518 U.S. 1019 (1996), the Tenth Circuit held that a plaintiff made a sufficient prima facie showing of causation to avoid summary judgment when he showed that shortly after filing an FLSA complaint, his employer began a pattern of retaliatory conduct related to his FLSA conduct, even though the employer did not finally terminate him until much later. In this case, plaintiff alleges that retaliation began immediately after his first verbal protest of unlawful activity during the meeting on November 15, 1996, and culminated two months later in termination. Were we to reach this issue, we would conclude that plaintiff has established conduct closely followed by adverse action, a circumstance which would justify an inference of retaliatory motive.

Given our finding that plaintiff has failed to prove the protected activity element of his prima facie case, plaintiff's success on this point is moot.

3. Punitive Damages

Raytheon argues in its motion to dismiss that punitive damages and compensatory damages for pain and suffering are not recoverable under the ADEA. Raytheon addresses this argument solely to plaintiff's claim for discrimination under the ADEA, but we assume that it also encompasses plaintiff's claim for retaliation under the ADEA.

Plaintiff concedes that he is not entitled to compensatory and punitive damages on his ADEA discrimination claim, but he apparently argues that he is entitled to compensatory and punitive damages for *retaliation* under the ADEA. In this regard, he states as follows:

> plaintiff will agree to strike those portions of [the ADEA discrimination claim] which appear to seek relief in the form of compensatory damages and punitive damages with the exception of liquidated damages. . . . The plaintiff strongly believes that he is entitled to compensatory damages under [the ADEA retaliation claim]. The plaintiff's concession should not be construed as relating to his allegation of unlawful ***retaliation*** under the ADEA.

Plaintiff's Opposition To Defendant's Motion For Partial Dismissal (Doc. #32) filed January 30, 1998, at 2 (emphasis in original). In the pretrial order, plaintiff contends that he is entitled to punitive damages for retaliation under the ADEA upon a showing that Raytheon acted with malice or with reckless indifference to his federally protected rights.

The ADEA provides in pertinent part as follows:

> Amounts owing to a person as a result of a violation of this Act shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of [the Fair Labor Standards Act]: Provided, that liquidated damages shall be payable only in cases of willful violations of this Act.

29 U.S.C. § 626(b). The Tenth Circuit has held that punitive damages are not recoverable under the ADEA. *See Bruno v. Western Elec. Co.*, 829 F.2d 957, 967 (10th Cir. 1987). Moreover, while the ADEA is silent on the question, the Tenth Circuit has held that it does not authorize recovery of compensatory damages. *Perrell v. Financeamerica Corp.*, 726 F.2d 654, 655 (10th Cir. 1984). Plaintiff therefore may not recover punitive damages or compensatory damages for pain and suffering under his ADEA retaliation claim.

Accordingly, the Court finds that Raytheon's motion to dismiss plaintiff's claim for punitive and compensatory damages for retaliation under the ADEA must be sustained.

B. Title VII Claims of Retaliation Based On Complaints Of National Origin Discrimination

For reasons that are not apparent, the parties have not proffered detailed arguments addressed to plaintiff's retaliation claim under Title VII. As noted above, Raytheon argues that it is entitled to summary judgment on plaintiff's claim for retaliation in violation of Title VII because (1) plaintiff had no reasonable belief that Raytheon was engaged in national origin discrimination; (2) plaintiff has no evidence of a causal connection between his complaints of discrimination and any adverse action toward him; and (3) even if plaintiff has a prima facie case of actionable retaliation, he has no evidence that Raytheon's stated reasons for his termination were false. Raytheon cites few facts which are pertinent to plaintiff's charge of national origin discrimination, however, and plaintiff does not address the Title VII retaliation issue at all.[24]

1. Protected Opposition

Despite plaintiff's failure to respond to Raytheon's arguments in support of summary judgment on this issue, we cannot sustain Raytheon's motion regarding protected opposition because Raytheon has failed to establish its entitlement to judgment as a matter of law. *See* Fed.R.Civ.P. 56(e) (if adverse party does not respond, summary judgment, *if appropriate*, may issue). Raytheon argues that plaintiff did not engage in protected opposition to national origin discrimination because his retaliation claim came only after his supervisors criticized his performance, after they told him to leave meetings to which he was not invited, and after plaintiff argued with his supervisors and others and disobeyed orders from supervisors. Raytheon also argues that plaintiff, after consulting with counsel, made a baseless and unfounded allegation in an effort "to intimidate Raytheon into retaining an incompetent, rude, and arrogant employee." While these facts may give rise to an inference that plaintiff's complaint of national origin discrimination was not reasonable, they are insufficient to establish Raytheon's entitlement to judgment as a matter of law. Raytheon's arguments do not address any facts which are specific to plaintiff's retaliation claim under Title VII; instead, they merely summarize Raytheon's arguments against plaintiff's ADEA retaliation claim.

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[24] Plaintiff makes one passing reference to the national origin aspect of his retaliation claim in his argument that "when plaintiff made his first written complaint to Long . . . [h]e admitted that he does not know the ages of most of the engineers working with him and he does not know what their national origins are." *Plaintiff's Opposition To Defendant's Motion For Summary Judgment*, (Doc. #71) filed June 1, 1998, at 39.

2. Causal Connection

Raytheon's sole argument against the causal connection element of plaintiff's claim is that "[a]fter he had been sternly warned about his performance and attitude, plaintiff turned in work that was far below the quality of prior work" his supervisors had previously criticized, and that "[p]laintiff, who has many years of experience with a large number of employers, certainly had to know that his supervisors would find his work unacceptable." Again, Raytheon's arguments do not address any specific facts pertinent to plaintiff's claim of retaliation based on complaints of national origin discrimination.

Raytheon's arguments against plaintiff's prima facie case of retaliation under Title VII may eventually carry the day. At this point, however, for reasons discussed in connection with plaintiff's claim of retaliation under the ADEA, we cannot conclude that summary judgment is appropriate for Raytheon on this issue.

3. Raytheon's Asserted Reasons For Its Action

Once plaintiff establishes a prima facie case, the burden shifts to Raytheon to set forth reasons for its action which, if taken as true, would permit the conclusion that there was a nondiscriminatory reason for its action. *Conner*, 121 F.3d at 1394; *Forsythe v. Board of Educ. of U.S.D. No.489*, 956 F. Supp. 927, 932 (D. Kan. 1997). Raytheon argues that even if plaintiff were able to establish a prima facie case of retaliation, it had legitimate reasons for its treatment of plaintiff. Raytheon asserts that plaintiff's performance review of 1996 reflects his inaccurate work and his tendency to argue with those who disagreed with his work; that the special review on November 15, 1996, resulted from plaintiff's refusal to obey his superiors, his lack of teamwork, and his failure to treat others courteously; and that after the meeting on November 15, 1996, the quality of plaintiff's work was poor, his supervisors could find no assignments that they believed he could perform, and other departments expressed no interest in working with him.

Plaintiff responds that he has a solid work history; that Gaines believed he was capable and worked hard; that three different supervisors had given him "fully competent" ratings for three consecutive years; that Arnold believed that he was technically competent and would have supervised him again; and that Kavie recommended that he be transferred to another position before he eventually decided to fire him. He also argues that "the fact that Long is blatantly lying about not telling plaintiff's management that he had complained of discrimination" gives rise to an inference of discrimination.[25] Finally, plaintiff asserts that questions about his work performance are simply questions of fact which the jury must decide.

On this record we conclude as a matter of law that Raytheon had legitimate reasons for any identified adverse treatment of plaintiff. Between November 15, 1996, and plaintiff's termination on January 24, 1997, plaintiff received two unfavorable performance reviews. It is undisputed that plaintiff's supervisors believed he had a negative attitude, which they perceived as "I'm right, you're wrong"; that they perceived his work to be poor; that they found errors in his calculations; that plaintiff acted resentfully when Gaines tried to give him instructions; that Gaines believed that plaintiff disagreed with Gaines' supervision; and that Gaines told Arnold that plaintiff was extremely difficult to deal with due to his "arrogant incompetence." It is undisputed that plaintiff sent out a memorandum which contained recommendations that were contrary to the instructions which Gaines had given him; that he completed two projects in a manner that Gaines found unacceptable; and that Gaines and Kavie could not identify other assignments that they thought plaintiff would perform satisfactorily. Furthermore, Long did not investigate plaintiff's discrimination charges because she had already reviewed examples of his poor work and had heard his supervisors describe negatively his work, attitude, and behavior. Eleven foreign-born Grade 9 Senior Engineers earned more than plaintiff, and these engineers (like plaintiff) earned more than at least 11 other native-born engineers in the same position. Ulhaque, another employee of Pakistani national origin assigned to the Hawker program, did not receive poor evaluations or low merit increases. Plaintiff does not dispute these facts, and they are not materially undercut by the fact that plaintiff had previously received positive reviews.

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[25] Plaintiff bases this argument on Bruner's deposition testimony. However, Bruner has submitted corrections which retracted the relevant portions of the deposition testimony upon which plaintiff relies. *See* note 19, *supra*. Accordingly, there is no record support for plaintiff's argument that Long was untruthful. *See* analysis, *supra*.

Once Raytheon offers a legitimate reason for its action, the burden shifts back to plaintiff to show that there is a genuine dispute of material fact as to whether Raytheon's proffered reason for the challenged action is pretextual. *Conner*, 121 F.3d at 1394. To avoid summary judgment at this stage, plaintiff is required to produce evidence that the adverse action was in retaliation for his protected activity, either through the use of direct evidence or by showing that Raytheon's proffered non-retaliatory reasons for its action were pretextual. *Id.* at 1396. Pretext may be established by showing either "that a discriminatory reason more likely motivated the employer or . . . that the employer's proffered reason is unworthy of credence." *REA v. Martin Marietta Corp.*, 29 F.3d 1450, 1455 (10th Cir. 1994) (quoting *Texas*

Dep't of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981)). Where as here plaintiff seeks to demonstrate that the employer's explanation is merely a pretext, the Court requires a showing that "the tendered reason for the employment decision was not the genuine motivating reason, but rather was a disingenuous or sham reason." *Reynolds v. School District No. 1 Denver*, 69 F.3d 1523, 1535 (10th Cir. 1995). Accordingly, plaintiff must produce evidence from which a reasonable jury could believe that Raytheon's proffered reason is a false one in order to survive summary judgment. *Id.*

Plaintiff argues that any errors occurred in the preliminary stages of developing a new aircraft, at a time when the department was undermanned. He argues that the errors were "not serious enough" for Arnold to down-grade his 1996 performance review; that Arnold gave him a "fully competent" rating on his 1996 review; that he received no assignments after November 27, 1996; and that Raytheon terminated his employment after he complained of discrimination on January 13, 1997. Plaintiff argues that the record reveals disputed questions of fact concerning his work assignments and his supervisors' attempts to transfer him, and that such facts should be "unraveled" by a jury.

Raytheon acknowledges plaintiff's *belief* that his performance was consistently outstanding, but argues that plaintiff's self-appraisals of performance do not create a genuine issue of material fact. *See Forsythe*, 956 F. Supp. at 934 (plaintiff's self-appraisal of job skills does not create genuine issue of material fact) (quoting *Schultz v. General Elec. Capital Corp.*, 37 F.3d 329, 334 (7th Cir. 1994) (employee's own self-serving remarks standing alone insufficient to raise doubts as to credence of employer's explanation for termination)); *Furr v. Seagate Technology, Inc.*, 82 F.3d 980, 988 (10th Cir. 1996) (manager's perception of employee's performance is relevant, while plaintiff's subjective evaluation of his own relative performance is not). Raytheon further argues that its treatment of Ulhaque, another Hawker aircraft employee of Pakistani national origin, negates plaintiff's pretext argument. According to Raytheon, its treatment of Ulhaque proves that it had no bias against foreign-born engineers, including those born in Pakistan.

Plaintiff has failed to establish genuine issues of material fact whether Raytheon's articulated reasons for its action were pretextual. The Tenth Circuit Court of Appeals has recognized that summary judgment is not ordinarily appropriate for settling issues of intent or motivation. *Setliff v. Memorial Hosp. of Sheridan County*, 850 F.2d 1384, 1394, n.12 (10th Cir. 1988). However, in this case, the record does not reveal that at the time of his termination (or at the time of any earlier adverse action) there was any dispute or a genuine issue concerning the sincerity of Raytheon's proffered reasons. In this case the totality of plaintiff's proffered evidence is insufficient to raise a genuine doubt about Raytheon's motivation. The test is good faith belief. *McKnight*, __ F.3d __, 1998 WL 384608; *Reynolds*, 69 F.3d at 1535.

Based upon the foregoing, this Court finds no genuine issue of material fact whether Raytheon's stated reasons for termination were pretextual. While plaintiff believes that he is a very good engineer, plaintiff does not deny that he committed errors and that his supervisors had lost confidence in his ability to perform. Accordingly, we find that Raytheon is entitled to summary judgment on plaintiff's claim for national origin retaliation under Title VII.[26]

II. Breach Of Contract

While plaintiff has opposed defendant's motion to dismiss his contract claims, his opposition is moot in view of the fact that he has not opposed Raytheon's motion for summary judgment on the claims for breach of implied and express contract. Because plaintiff has not opposed Raytheon's motion for summary judgment, we could find that plaintiff has abandoned his contract claims and grant summary judgment for Raytheon on that ground. *See* Fed.R.Civ.P. 56(e) (if adverse party does not respond, summary judgment, if appropriate, may issue). Even if plaintiff had fully responded, however, summary judgment would be appropriate. The record contains no support for any finding that plaintiff had a contract of employment, either express or implied.[27]

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[26] While the pretrial order contains loose language which alleges that Raytheon retaliated against plaintiff by assorted varieties of adverse employment action prior to dismissal, the summary judgment briefs do not address that issue in any meaningful way. The Court therefore assumes that plaintiff's claim is limited to retaliation based on the termination of employment on January 24, 1997, and that he has waived any claims of retaliation based on the fact that prior to termination he was excluded from meetings, treated in a hostile manner, and so forth.

[27] Raytheon's motion for partial dismissal addressed plaintiff's breach of implied contract claim. Subsequent to that

(Cont'd)

Kansas adheres to the common law doctrine of employment-at-will. *Ramirez v. IBP, Inc.*, 913 F. Supp. 1421, 1428 (D. Kan. 1995). Under that doctrine, employees are considered at-will employees unless there is an express or implied contract of employment. *Anglemyer v. Hamilton County Hosp.*, 58 F.3d 533, 537 (10th Cir. 1995). In the absence of a contract governing the duration of employment, the employment is terminable at the will of either party. *Dickens v. Snodgrass, Dunlap & Co.*, 255 Kan. 164, 172, 872 P.2d 252, 259 (1994).

Under Kansas law, the intent of the contracting parties is normally a question of fact for the jury, and determination of whether there is an implied contract in employment requires a factual inquiry. *Boyd v. Doskocil Sausage Co.*, 686 F. Supp. 875, 877 (D. Kan. 1988); *Morriss v. Coleman Co.*, 241 Kan. 501, 512, 738 P.2d 841, 848 (1987). This Court has previously noted that summary judgment may be appropriate when plaintiff's unilateral expectation of continued employment is the only basis for the alleged implied contract. *Garcia-Harding v. Bank Midwest, N.A.*, 964 F. Supp. 1492, 1511 (D. Kan. 1997).

The ultimate issue in determining the existence of an implied-in-fact contract is whether the totality of the

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(Cont'd)

motion, plaintiff modified his contract claim to include a claim for breach of express contract. *See Pretrial Order* (Doc. #58) filed April 21, 1998, at 11-12. Raytheon then addressed both contract claims in its motion for summary judgment. Because plaintiff did not respond to Raytheon's summary judgment arguments on the contract issues, we look to plaintiff's arguments in opposition to Raytheon's motion for partial dismissal.

circumstances supports a finding that the parties objectively manifested their intent to alter the at-will employment relationship. *Garcia-Harding*, 964 F. Supp. at 1512. The factors to be considered in making such a determination include the understanding and intent of the parties, the conduct of the parties, the usages of the business, the situation and objective of the parties giving rise to the relationship, the nature of the employment, and any other circumstances surrounding the employment relationship which would tend to make clear the intention of the parties at the time the employment relationship commenced. *Anglemyer*, 58 F.3d at 537; *Enstrom v. Beech Aircraft Corp.*, 712 F. Supp. 841 (D. Kan. 1989); *Morriss*, 241 Kan. at 513, 738 P.2d at 848-49. Similarly, no express contract of employment exists without an agreed-upon statement as to the specific duration of employment. *O'Loughlin v. Pritchard Corp.*, 972 F. Supp. 1352, 1368 (D. Kan. 1997).

Plaintiff argues that Raytheon cannot secure dismissal under *Castleberry v. Boeing Co.*, 880 F. Supp. 1435 (D. Kan. 1995), because that case was decided on summary judgment. There, the court granted summary judgment on plaintiff's breach of contract claim because plaintiff had not produced evidence to support his allegation that defendant had intended to enter a contract for continued employment or to modify the at-will employment relationship. *Id.* at 1445. Raytheon has addressed the contract issues in a summary judgment context. As noted above, plaintiff had the opportunity to respond to Raytheon's motion, but he did not do so. Accordingly, our reliance upon *Castleberry* is entirely appropriate.[28]

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[28] To the extent that we rely on any arguments contained in Raytheon's motion for partial dismissal that are not contained in the motion for summary judgment, we construe the motion for partial dismissal as a motion for summary judgment. *See* Fed.R.Civ.P. 12(c).

In this case, the summary judgment record is devoid of evidence that plaintiff relied on any Raytheon policy or practice to refrain from firing employees except for good cause. Likewise the record contains no evidence that Raytheon communicated to plaintiff, at any time during his employment, any policy not to fire employees except for good cause. Indeed, plaintiff has admitted that no one at Raytheon ever told him that he could only be terminated for good or just cause, and he believed throughout his employment that he was free to leave at any time. The fact that his supervisors indicated that they would work with him to improve his performance does not support a finding that plaintiff and Raytheon objectively manifested their intent to alter the at-will employment relationship. In light of these undisputed facts, plaintiff cannot establish the existence of an implied contract of employment. Accordingly, Raytheon is entitled to summary judgment on plaintiff's claim for breach of implied contract.

Likewise, the summary judgment record is devoid of any evidence of an agreed-upon statement concerning the duration of plaintiff's employment. Therefore plaintiff cannot establish the existence of an express contract of employment. Accordingly, Raytheon is also entitled to summary judgment on plaintiff's claim for breach of express contract.

IT IS THEREFORE ORDERED that defendant's *Motion For Partial Dismissal* (Doc. #24) filed January 12, 1998, be and hereby is **SUSTAINED**.

IT IS FURTHER ORDERED that defendant's *Motion For Summary Judgment* (Doc. #62) filed April 29, 1998, be and hereby is **SUSTAINED**.

Dated this 23rd day of July, 1998, at Kansas City, Kansas.

s/ Kathryn H. Vratil
Kathryn H. Vratil
United States District Judge

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED JULY 11, 2000

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 98-3324

MOHAMMAD M. SHINWARI,

Plaintiff – Appellant,

v.

RAYTHEON AIRCRAFT COMPANY,

Defendant – Appellee.

ORDER

Filed July 11, 2000

Before **BRORBY**, **PORFILIO** and **LUCERO**, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: s/ M. Talamas
Deputy Clerk